Supreme Court of the United States

OCTOBER TERM, 1929

No. 639

BROAD RIVER POWER COMPANY, COLUMBIA RAILWAY, GAS AND ELECTRIC COMPANY, AND F. D. CAMPBELL, PETITIONERS,

versus

STATE OF SOUTH CAROLINA, EX REL., JOHN M. DANIEL, ATTORNEY GENERAL, CITY OF COLUMBIA, TOWN OF ARDEN, TOWN OF EAU CLAIRE, COLUMBIA COLLEGE, CHICORA COLLEGE FOR WOMEN, DR. W. B. BURNEY, NORTH COLUMBIA LAND COMPANY, THE RAILROAD COMMISSION AND THE COLUMBIA SCHOOL BOARD

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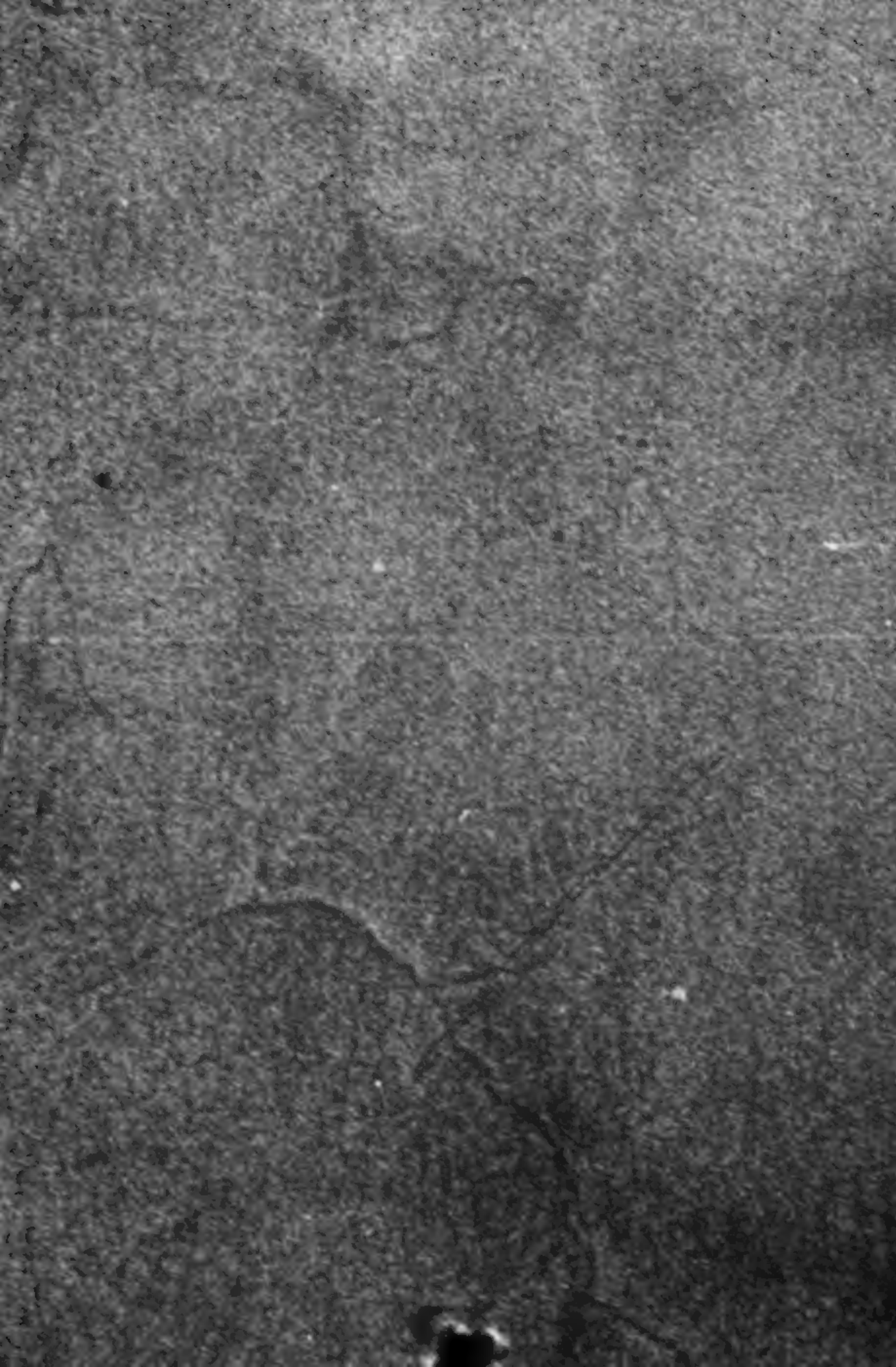

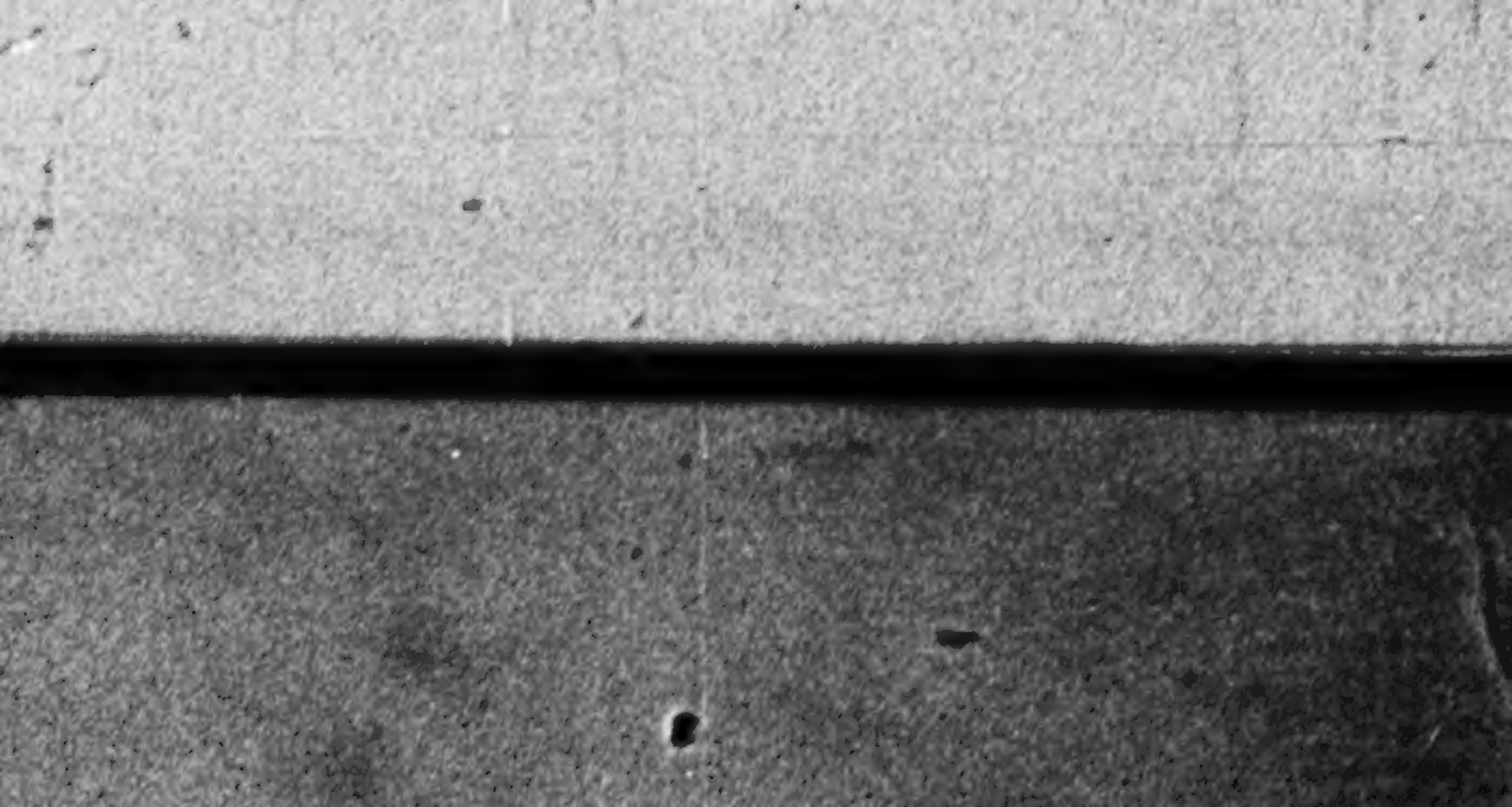

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A

INTRODUCTORY SUMMARY

The issue in this case is whether the City of Columbia and vicinity shall be deprived of electric street railway service.

The Columbia Railway, Gas & Electric Company (chartered as "The Columbia Electric Street Railway, Light & Power Company") carried on the combined electric street railway, light and power business, under said charter from the date of its incorporation in 1891, until shortly after its stock was acquired by the Broad River Power Company in 1924. In July, 1925, the companies had the old company execute a deed purporting to transfer to the Power Company all the so-called electric light and power (and gas) properties—thus taking approximately $6,000,000.00 net worth of property from the old company, *without consideration*, and leaving it with only the street cars and railway tracks—and thereafter, in March, 1927, abandoned the electric railway service altogether.

The Railroad Commission (in July, 1927), and the Supreme Court of South Carolina (in July, 1929), ordered the companies to restore the service.

We submit that this judgment should be affirmed, upon the following grounds, as found by the Commission and by that Court:

(1) The Companies, which must be treated as one public service corporation, are under charter obligation to operate the service, in that the charter, especially as supplemented by the City franchise, imposes a duty on the company to operate said service, and embraces the electric railway as well as the electric light and power service, the attempted separation being merely pretensive and fictitious; hence the companies are bound to perform all the services authorized as long as they retain any of the benefits of the charter-franchise. (*United Fuel Gas Company v. R. R. Com. of Ky.*, 278 U. S., 300; 73 L. Ed., 390, and cases cited; also *Spartanburg v. S. C. Gas & E. Co.*, 130 S. C., 125.)

(2) The companies are bound by franchise contract with the City of Columbia to operate the service, as directed by City Council, regardless of alleged losses. (*Henderson Water Power Co. v. Corp. Com. of N. C.*, 278 U. S., 282; 70 L. Ed., 273. *Columbus R. P. & L. Co. v. Columbus*, 249 U. S., 399; 63 L. Ed., 669, and cases cited. *Spartanburg v. Spartanburg Gas & Elec. Co.*, 130 S. C., 125.)

(3) The companies are bound by express contract with the various development companies providing for the continued operation of the service. (*Franklin Tel. Co. v. Harrison*, 145 U. S., 459; 36 L. Ed., 775. *McKell v. C. & O. R. R.*, 175 Fed., 321 [C. C. A., 6th].)

(4) The Street Railway service need not be operated at a loss, but could be made to yield a fair return if honestly operated, the attempt to abandon the street railway service being the culmination of a well-designed scheme to get rid of this branch of the franchise—so as to sell securities at a better rate, and to make increased profits from the electric light and power phase of the franchise.

We submit that these positions are overwhelmingly sustained by the record and by the authorities.

This case does not involve rates. It involves the bold, determined, high-handed attempt of a public service corporation to abandon an entire branch of the service authorized by its charter—in violation of charter and contract obligations, against the protest of the State and in disregard of the Railroad Commission.

B

STATEMENT OF FACTS

(Power Company Organized in 1924 to Acquire Columbia Railway, Gas & Electric Company and Then Abandon Street Railway Service.)

The Broad River Power Company was organized in 1924 for the purpose of acquiring and holding the stock in the Columbia Railway, Gas & Electric Company (R., 837), (Ex. 27), which had operated the combined electric street railway, light and power business in the City of Columbia, S. C., and vicinity, under State and City franchise, since 1891 (R., 873), (Ex. 27). This purpose was accomplished by the General Gas & Electric Company of New York, which had acquired the stock in the Columbia Railway, Gas & Electric Company, contributing said Columbia Railway, Gas & Electric Company stock as a capital stock contribution to the Broad River Power Company, and receiving in exchange therefor stock in the Power Company (R., 672–676).

During this period (1923–1924) the annual operating revenue attributed to the so-called "Electric Department" (about $1,000,000.00), in statements published by the Broad River Power Company, was approximately four times the operating expenses (about $250,000.00) for such department (Ex. A-25, R., 1122).

After this period the companies had the same officers from President on down through bookkeeper, and also the same offices in the City of Columbia and in the City of New York (R., 1049–1057), (Ex. 6-7-8-9, McF.).

The Broad River Power Company then undertook to separate the electric street railway branch of the business by having the Columbia Railway, Gas & Electric Company transfer to the Broad River Power Company, in July, 1925, *without valuable consideration* (R., 418, 634–635), all the so-called electric light and power (and gas) properties, having a net equity in appraised value of approximately $6,000,000.00, thus leaving

only the street cars and tracks in the name of the Columbia Railway, Gas & Electric Company (R., 1070–1118), (Ex. A-11). This transfer purported to have been made in pursuance of the so-called Merger Act, which was passed in March of the 1925 session of the South Carolina Legislature, at the instance of the companies, for the ostensible purpose of authorizing the Columbia Railway, Gas & Electric Company and its subsidiaries to merge into the Broad River Power Company (R., 806). Thereafter the Broad River Power Company claims to have advanced operating funds to the Columbia Railway, Gas & Electric Company, without security (R., 398, 1024).

After this the Columbia Railway, Gas & Electric Company in March, 1927, ceased electric street railway service altogether, later advancing upon the plea of lack of funds (R., 1048), and excessive competition from jitneys and buses (R., 21, 1048). It was afterwards discovered that the Broad River Power Company had during this period contributed at least $19,000-.00 in cash to the supposedly competing bus company (R., 408, 776–778).

During the progress of this suit the appellant companies had the Columbia Railway, Gas & Electric Company file a voluntary petition in bankruptcy, listing its assets at $50,444.09, and its liabilities at $3,267,978.75, and obtained a temporary stay order against the prosecution of this suit (R., 101). The District Court, and also the Circuit Court of Appeals of the Fourth Circuit, ruled that the company had no right to go into bankruptcy, and revoked the temporary stay order. (See 25 F. [2nd] 329, and 27 F. [2nd] 52.)

Under these circumstances it was found and ruled by the South Carolina R. R. Commission, by the Special Referee, and also by the South Carolina Supreme Court, that the Columbia Railway, Gas & Electric Company had been converted into a mere instrumentality or agency of the Broad River Power Company, and that the two corporations, for the purposes of this case, must be treated as having been merged into one public service corporation.

(Columbia Railway, Gas & Electric Company Oranized in 1891 to Carry on Electric Street Railway, Light and Power Business.)

The Columbia Railway, Gas & Electric Company was created by Special act of the South Carolina Legislature, dated December 16, 1891, under the name of Columbia Electric Street Railway, Light & Power Company (R., 809), the name being thereafter changed by amendment in 1911 to Columbia Railway, Gas & Electric Company (R., 15, F., 20).

This act authorized the company, as its name implied, to carry on the electric street railway, electric light, electric power (and gas) business in the City of Columbia and vicinity (R., 809). These powers in part had formerly been conferred upon different companies for various periods, but this act authorized the consolidation of two of these companies and the purchase of the other, and conferred upon the one company for a period of fifty years all these powers which had formerly been granted to the several companies (R., 809–819).

The powers thus acquired by the Columbia Electric Street Railway, Light & Power Company included the powers (formerly conferred upon the Congaree Gas & Electric Company) to make, manufacture, sell and distribute electricity (and gas) and to erect the necessary poles and wires and other equipment therefor (R., 813–817); also the powers (formerly conferred upon the Columbia Electric Street and Suburban Railway and Electric Power Company) to operate electric street railway service in the City of Columbia and vicinity with electric power, with consent of Columbia City Council, and to provide or contract for electric power for any and all purposes (R., 811–813).

The power to carry on the electric street railway and power branch of its operations was conditioned, among other things, upon the company's commencing operations within five years and upon obtaining the consent of Columbia City Council (R., 812). This consent was obtained under ordinances expressly providing it should be the duty of the company to run their cars daily and/or as required by City Council (R., 835).

The original authorized capital stock of the company was $75,000.00, and the duration of the charter granted by this act was fifty years.

The company duly accepted the charter, effected the consolidation and the purchase authorized, and commenced its operations thereunder, and the old companies ceased to exist (Ex. 10, p. 13). Under this charter the company acquired and constructed electric power plants and sub-stations, electric street railway lines, electric poles and wires and rights-of-way (R., 653–656), always using the electric poles and wires and rights-of-way in connection with the electric light and power business as well as for the electric street railway service (R., 300–372, 405–406), and generally developed and conducted its electric street railway, light and power business as one public utility business, up to the time of the alleged separation above mentioned (R., 17, 489–510). The company also increased its capital stock under this charter from time to time—$500,000.00 in 1899; $1,600,000.00 in 1905, and to $3,000,000.00 in 1911 (that is, twenty thousand shares of common, $2,000,000, and one thousand shares of preferred $1,000,000) (Ex. 10). Throughout this period and down to the alleged separation above referred to, the income from all sources of the companies' operations was carried in a common fund, and all expenditures were made from this common fund (R., 654–656). It is now impossible to ascertain whether the companies' power plants and electric system were constructed more from the proceeds of the so-called electric railway department or from the so-called electric department (R., 656).

The consolidated company was also granted the right by special act of the South Carolina Legislature to construct and maintain a dam across the Congaree River near the confluence of the Broad and Saluda Rivers at Columbia (S. C. Stat. 1912, p. 779, Ex. 10, p. 55).

Exhibit 10, which is the report on the Columbia Railway, Gas & Electric Company, prepared by the counsel for the purchasers in 1924, particularly called attention at page 10 under the general discussion of "Primary Franchise" to the ordinance providing the obligation to run the cars.

Since the Act of 1891, there has been no other public utility operating in this community.

Hence, it is our contention—and it was so found by the South Carolina Supreme Court and also by the South Carolina Railroad Commission—that the charter, especially when taken in connection with city ordinances and development company contracts, imposes a positive duty to operate the electric railway service, and also that, under the charter, and in view of the operation and development of the system, the electric railway is inseparably linked with the electric light and power phases of the franchise.

(Franchise For Operation in Columbia Obtained Under Ordinances Specifically Requiring Daily Operation.)

The fifty (50) year state charter as above explained required the consent of Columbia City Council, as a condition for the operation of the electric street railway service. The Company, by its president, filed a written application on September 13, 1892, asking for such consent (R., 832–833), and submitted an ordinance to accomplish that purpose. City Council granted the petition and by ordinance dated October 11, 1892, prescribed the terms upon which such consent was given. This ordinance complete is embodied in the Record in Section 561 (old Section 360), Section 562 (old Section 361), p. 838, and Section 565 (old Section 362), p. 840.

This ordinance in effect reapplied the old ordinances regulating the Columbia Street Railway Company (Section 360), and authorized the use of electricity as motive power (Section 361) and the erecting of poles and the hanging of wires thereon, and expressly reserved to the City Council "the right to regulate by ordinance the manner of operating said electric railway . . . by such further enactments as by their judgments the public welfare may demand." (Section 362, p. 840.)

The ordinances which were thus reapplied for the Columbia Electric Street Railway, Light and Power Company, provided for the laying of the tracks and the paving as directed by City Council (Section 560 [old Section 349]), and also "that it should be the duty of the Company on week days to run a car

for passengers at least every hour from 7 A. M. to 9 P. M." (Section 553 [old Section 352], R., 835), and specially prescribed a "Penalty for Failure to Run" "if the said company should neglect or refuse to run their passenger cars as herein provided . . ." (Section 555 [old Section 354], R., 836), and also reserved the right of amendment of the ordinance to City Council (Section 560 [old Section 359], R., 837).

From time to time thereafter various ordinances were enacted by City Council regulating the operation of the street railway service, some being according to our view of a police nature and some of a contractual character (R., 839–845).

Under these ordinances, many of which are set forth in the record on pages 830 to 845, the Company constructed and operated its electric railway tracks, together with the electric poles and wires comprising its electric street railway system (R., 490–492). The poles and wires constructed and acquired under this franchise, and used in connecton wth the electric street railway operations, are now being used by the Broad River Power Company in connection with its electric light and power business (R., 405–406, 396).

The last ordinance apparently granting to the company the right to lay tracks on the City streets was enacted on the 23rd day of August, 1921 (R., 845). This ordinance, as was the case with all prior ordinances of the same character, contained the provision: "Provided further that the above privileges are upon the express condition that the said company shall comply with all the rules, regulations and ordinances of the City of Columbia, now of force or hereafter to be enacted, relating to the construction of street railways and the operation of the same" (R., 845).

On January 24, 1928, during the progress of this suit, Columbia City Council passed an amendatory ordinance directing the companies to run their cars on all their lines leading into and from the City of Columbia at least on a thirty minute schedule from 6 A. M. to 11 P. M. daily, and to institute and maintain the said schedule in constant operation (R., 849–850).

It is our contention and it was so found by the S. C. Supreme Court, that these ordinances and the operation under them by

the Company, particularly when coupled with the provisions of the state charter, constitute a supplementary and secondary franchise contract with the City of Columbia specifically requiring the operation of the electric railway service, at least for the fifty year charter life of the company, regardless of alleged losses.

(Electric Railway System Extended under Contracts with Development Companies Providing for Continued Operation.)

In the extension and development of its electric railway, light and power business, which occurred coincidentally with the growth of the community, the Company acquired various suburban lines and rights-of-way, and entered into various contracts with land development companies requiring operation of the electric railway service.

In 1900 the Company acquired the line of railway with its rights-of-way, privileges and appurtenances which had been constructed about 1896 by the Columbia and Eau Claire Electric Railway Company to serve the adjacent communities of Hyatts Park and Eau Claire (R., 297, 848). In 1902 the Company leased from the Columbia Land and Investment Company a line of electric railway, constructed into the village of Shandon, for a period of 99 years from date. This lease provided, among other things, that the Company would "during said period continuously operate said line of railway by running at least one car per hour each way over the same between 7:30 a. m. to 8 p. m. daily" (R., 864-868). The Company afterwards acquired this tract of land in fee by deed executed in pursuance of said lease.

In 1906 the Company entered into a contract with the North Columbia Land Company for the acquisition of a line which had been constructed by the Hyatt Improvement Company, and for the construction and maintenance of a proposed extension to said line. This contract provided that after such conveyance and construction the Company would "thenceforth maintain and keep it in good condition and repair and run and operate street railway cars over the said line and extension in connection with its lines of street railway in and near the said

City of Columbia on convenient and reasonable schedules of not less than one car for every hour from eight o'clock in the morning to eight o'clock at night, and as much later and oftener as travel will warrant of each day . . ." (R., 851-854). A subsequent similar contract was entered into with the Shandon Annex Company May 30, 1910 (R., 855-857). In reliance upon this contract and agreement Dr. W. B. Burney gave the right-of-way through his property and contributed $6,000 in cash to the expenses of the construction of the line (R., 858–860).

In 1912 also the Company acquired the line of electric railway, together with all franchises, rights-of-way, and appurtenances, which had been constructed by the Suburban Transit Company into the community then known as Colonial Heights, now a part of the village of Eau Claire (R., 869–870). This Suburban Transit Company line had been constructed and operated in connection with the sale and development of the said community by the Suburban Homes Company, which had sold the lots under guarantee to furnish electric railway transportation (R., 353–363). The Suburban Transit Company had also obtained a special grant from the City of Columbia under ordinances providing among other things that "in consideration of the privileges and franchises herein granted, the Suburban Transit Company hereby covenants and agrees to conform to all the regulations and ordinances of the City of Columbia" (R., 840–842).

All these various lines of electric railway were operated by the company from the dates of their acquisition as parts and parcel of their one system, the charter having authorized the extension of the lines "five miles into the country." The rights of-way and poles have always been used and are now being used for carrying the electricity sold for light and power, as well as for the operation of the electric railway system.

Practically all of the surrounding communities of the City of Columbia were built up along these lines of electric railway and are dependent thereon for public transportation. Much of the property in these communities was bought and sold in reliance upon the continuance of the electric railway service in

accordance with the contracts above mentioned. (See Test. C. M. Scott, R., 309-321; Mrs. S. Y. Riddle, R., 336-341; W. M. Addison, R., 353-363; W. F. Cleveland, R., 372-380; W. M. Mason, R., 382.)

The Columbia College and Chicora College for Women chose college sites relying upon the continuance of the electric railway service under these contracts. (Test. of E. O. Watson, R., 346 and Dr. S. C. Byrd, R., 321.)

It is our position, and it was so found by the South Carolina Supreme Court, that these contracts, having been made in pursuance of its charter purposes, were intended for the benefit of the public, were relied upon by the public, are valid and subsisting and enforceable in this proceeding.

Company's General Business Profitable, but Electric Railway Service Neglected.

The company's public business as a whole has always been successful (See Exhibits A-28, A-25, R., 1122, A-41, R., 1126).

"The net earnings" of the company (that is, as we understand, the net operating earnings) during the last few years of operation of the combined electric street railway, light and power (and gas) service, as stated in Broad River Power Company advertisements for the sale of its bonds (Exhibits 27-30, 14-16 McF.) were as follows:

Year ending June 30, 1923	$661,501.00
Year ending June 30, 1924	759,516.00
Year ending Dec. 31, 1924	876,382.00
Year ending Dec. 31, 1925	937,740.00

At the time of the so-called transfer and separation hereinabove mentioned, that is, in July, 1925, the appraised value of the property sought to be transferred amounted to $11,406,723.43 against which the liabilities amounted to $7,053,211.88, thus leaving a net equity in the property of $4,353,511.55 (R., 635). Also the franchises were valued at $1,561,000.00, thus making the total equity in the assets so attempted to be conveyed $5,914,511.55 (R., 635). For this equity no valuable consideration was paid (R., 418, 635).

After this transfer the Columbia Railway Gas & Electric Company was left with total current assets amounting to $75,145.00, with current liabilities of $99,224.48, thus leaving a net deficiency of $24,078.56 (See Ex. A-26, R., 1123).

Following the deflation of 1920-1921 the Columbia Railway, Gas & Electric Company had a strike in 1922 of its motormen and conductors (R., 731). After this strike the company allowed its system to be seriously undermaintained (R., 735), and the gross income attributed to the service immediately decreased by approximately one-half (R., 732).

The record contains no evidence that the company made any effort to conciliate its workmen or the people who largely patronized the service (See R., 731–732).

After the so-called transfer and separation above mentioned the companies began an active campaign to abandon the electric railway service.

While the companies were complaining to the Railroad Commission that it was impossible to operate the service successfully, on account of the jitney and bus competion their officers were at the same time encouraging the citizens of the adjacent communities of Colonial Heights and Eau Claire to allow the bus company to enter (R., 356–7), and also actually contributed cash amounting to at least $19,000.00 to the operating expenses of the supposedly competing bus company (R., 774–781). The company was also declining to receive patronage offered (R., 363–365) and charging electric power to the so-called railway department at a rate of 36 2/3% higher than the rate charged to other power customers (R., 624).

The effect of these causes is shown by the following statement of the gross income of the so-called railway department taken from the companies' books during this period (Ex. A-19, J. W. W.).

Year	Income
1920	$436,500.00
1921	430,000.00
1922	196,000.00
1923	226,000.00
1924	201,000.00

Year	Income
1925	$158,000.00
1926	100,000.00

Throughout this period the income attributed to the so-called electric department steadily and rapidly decreased (R., 872) (Ex. 29). The population of the City of Columbia has increased from approximately ten or fifteen thousand in 1890 (R., 508) to something over fifty thousand (50,000) at the present time in the City proper with a total population of something over seventy thousand (70,000) in the territory which would be served by the street railway system.

During the years 1923 and 1924 the operating revenue attributed to the so-called electric department as compared with the operating expenses was as follows (Ex. A-25, R., 1122):

	1923	1924
Operating revenue	$955,734.00	$1,139,678.00
Operating expenses	249,252.00	253,092.00

No part of the income derived from the fixed assets belonging to the company was credited to the so-called "railway department."

After the so-called separation the Broad River Power Company charged the Columbia Railway Gas & Electric Company not only for power consumed but also for "pole rental," that is, for the use of the poles which had formerly been constructed for the benefit of the electric railway service (R., 396). But no credit was given to the Railway Department for the $6,000,000.00 net worth of property which the Broad River Power Company had taken from the Columbia Railway, Gas & Electric Company without consideration (Ex. A-12-19, R., 1118-1119).

Mr. J. P. Campbell, Treasurer of the companies, also testified that from the very outset they determined to eliminate the street railway branch of the service, if they found they could not operate it at a profit, "if it were possible to do so" (R., 678-679).

After this alleged separation the Broad River Power Company claims to have advanced operating funds totalling approximately $115,000.00 to the Columbia Railway, Gas &

Electric Company (R., 1024) for *power* and other expenses. These advances were made apparently by exchange of checks but were simply charges on the books and no evidence of the indebtedness or due date or rate of interest was agreed upon or fixed as between the companies (R., 398, 414, 1024).

The "net earnings" attributed to the Broad River Power Company, as shown by its statements published in connection with the sale of its bonds, covering largely the period since the so-called separation were as follows (See Exhibits 29, 31, A., 10, R., 1070):

Year ending March 31, 1926	$ 971,026.00
Year ending August 31, 1926	1,081,509.00
Year ending December 31, 1927	1,556,366.00

Throughout the period during which the company claims to have sustained operating losses on the so-called Railway Department the company's own statements, as published, upon analysis show that the earnings have been amply sufficient to pay handsome dividends on the stock.

The balance available (after paying operating and maintenance expenses, taxes and interest) for the years 1920 and 1921 (See Ex. A-29 J. W. W. and A-30 J. W. W.) and for the years 1922, 1923 and 1924 (Ex. 27); for the Columbia Railway, Gas & Electric Company, and the dividends actually paid and surplus set aside by the Broad River Power Company in 1925-1926 (Ex. A-41 J. W. W.) were as follows:

1920	$ 121,159.16
1921	236,028.36
1922	215,072.00
1923	364,403.00
1924 (June 30th)	418,751.00
1925 (Dividends—Common and Preferred)	334,545.00
1926 (Dividends—Common and Preferred)	349,682.00
Surplus	627,402.59
Total	$ 2,667,043.11

Based upon the foregoing facts and upon the Record herein it is our contention, and it was so found by the South Carolina Supreme Court and by the Railroad Commission, that the Elec-

tric Railway service in itself could with proper management be made to yield a fair return, but that the companies have sought to separate and abandon that branch of its service for the reason that the same is relatively more troublesome and less profitable, and at the same time to retain the extraordinarily easy and profitable electric light and power phases of its franchise.

REVIEW OF LEGAL PROCEEDINGS

The Company ceased the electric railway operations on March 11, 1927. This action was taken without making any application to the Railroad Commission or to any public body whatsoever (R., 413).

The Railroad Commission after several hearings handed down an order on July 28, 1927, directing the restoration of service. The Commission found among other things that the alleged separation and transfer was an act of bad faith and invalid, and that the companies had not made an honest effort to operate the electric railway service (R., 930-831).

No petition for a rehearing from this final order of the Railroad Commission was ever filed by the Companies, as required by the South Carolina Act regulating the procedure before the public utility commission. (See S. C. Acts of 1922, p. 938.) The Columbia Railway, Gas & Electric Company, however, instituted a suit in the United States District Court for the Eastern District of South Carolina for an injunction against the enforcement of the Railroad Commission's order and for a temporary restraining order. The temporary restraining order sought was refused by Judge Cochran, upon the ground among others that the Company had failed to make the application for rehearing as required by this Act. (See *Columbia Railway, Gas & Electric Company v. Blease, et al.* [U. S. D. C. E. D. S. C., 1927].)

This case was commenced on July 19, 1927. After certain motions and demurrers had been argued at the October, 1927, term of the Supreme Court, an order of reference was made by the Court on January 11, 1928, and the referee fixed January 25, 1928, for the first reference.

On January 24, 1928, the Columbia Railway, Gas & Electric Company, as hereinbefore stated, attempted to go into voluntary bankruptcy and obtained a temporary stay order against this suit. The Broad River Power Company likewise appeared and joined in the relief prayed for by the attempted bankrupt. Among the liabilities listed were "contracts to operate with the North Columbia Land Company, Columbia Land and Investment Company and Shandon Annex Company."

These attempts were finally defeated by the decision of the District Court (25 F. (2nd), 329), which was subsequently affirmed by the Circuit Court of Appeals of the Fourth Circuit rendered in June, 1928 (27 F. (2nd), 52), to which we earnestly invite the attention of this Court as admirably stating the duties and functions of this public service corporation.

The evidence was then taken, the case was argued at the October, 1928, term, the Court handed down its decision on July 9, 1929, ordering the restoration of service upon the grounds hereinbefore stated in the Introductory Summary. A petition for rehearing filed by the companies was dismissed on September 25, 1929.

It was not held by the Supreme Court, and it is not contended by us—as is suggested by petitioners—that the usual permissive charter alone, of an insolvent railroad or street railway company, requires continued operation at a loss. We submit, however, that we have no such situation in this case. We have here a solvent, prosperous, corporation, chartered as an electric street railway, light and power company, and bound by charter and contract obligations to operate its electric railway service, seeking to evade the more troublesome but to keep the more profitable phases of its business.

C

ARGUMENT

We will discuss the legal questions involved herein in the following order:

I. Charter Franchise Obligation to Operate, Arising from Retaining Benefits of Charter.

II. The Obligation to Operate Created by the City Ordinances.

III. The Obligation under the Development Company Contracts.

IV. The Question of the Necessity of Operation at a Loss.

While we discuss these grounds separately they should all be considered together. Any one is sufficient to sustain the judgment, but they should also be considered as mutually supplementary.

We are attaching hereto in the Appendix the companies' charter franchise, granted by the Act of 1891 and supplemented by the City ordinances and other contracts, as we conceive it should be construed.

I

The Act of 1891 conferred not only (1) the right to be a corporation, but (2) also the right to do the things therein authorized, that is, to carry on the Electric-street-railway-light-and-power (and gas) business for a period of fifty years. That is, it conferred a franchise both (1) to be a corporation, and also (2) to carry on these public services.

Of course this was, in effect, the creation *de novo* of a new corporation deriving all its powers and franchises from this Act. (12 R. C. L., 220; 7 R. C. L., 1770; *Atlantic & Gulf R. R. Co. v. State of Georgia*, 98 U. S., 359; 25 L. Ed., 185; *Rochester R. R. v. City of Rochester*, 205 U. S., 236; 51 L. Ed., 784; *Railroad Company v. Gibbes Treasury*, 27 S. C., 385; *Interstate Consol. St. R. Co. v. Massachusetts*, 52 L. Ed., 111.)

This Act was not in any sense "the usual permissive charter of a Railroad Company" referred to in the *Texas case* (264 U. S., 79), and the other cases (254 U. S., 513, 65 L. Ed., 380), relied upon by appellants. It was an act of incorporation. It was a franchise to carry on the electric street railway, light and power (and gas) business. It was a franchise to operate an electric street railway service in the City of Columbia and vicinity in connection with such business. It bore an intimate relationship to the City of Columbia (which was the State's capital city), and was subject to the ordinances enacted by City Council, which expressly imposed the duty on the company to operate the electric railway service.

(Public Service Corporations Bound to Perform Services Authorized as Long as Charter Retained.)

The principle that a public service corporation is bound, if required by the State, to perform all the public services authorized by its charter franchise, as long as it retains any of the benefits of said franchise, is well established and recognized by all the authorities.

See *United Fuel Gas Co. v. R. R. Com. of Ky.*, 278 U. S., 300, 73 L. Ed., 390, and cases cited.

26 C. J., 1014; 14 C. J., 110; 12 R. C. L., 199–200; *McCandless v. R. R. Co.*, 38 S. C., 103; *Harmon v. Cola. & Greenville R. R. Co.*, 28 S. C., 401; *C. & O. R. R. Co. v. Pub. Serv. Com.*, 242 U. S., 603, 61 L. Ed., 603.

> "The primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders. This duty does not permit it to pick and choose and to serve only those portions of the territory which it finds most profitable, leaving the remainder to get along without the service which it alone is in a position to give."
>
> *United Fuel Gas Company v. Railroad Commission of Ky.*, 278 U. S., 300, 73 L. Ed., 390.

"This duty," said the United States Supreme Court in *Chesapeake & O. R. R. Co. v. Public Service Commission*, 242 U. S., 603, 61 L. Ed., 603, **"arises out of the acceptance and enjoyment of the powers and privileges granted by the state, and endures so long as they are retained. It represents a part of what the company undertakes to do in return for them, and its performance cannot be avoided merely because it will be attended by some pecuniary loss . . ."** (Pages 522–523.)

"When a railroad company accepts a charter," as our own Court said in the case of *Harmon v. Columbia & Greenville Railroad Co.*, 28 S. C., 401, "it assumes the performance of all the duties to the public which are imposed upon it by the charter or the general laws of the State. . . . **It cannot be permitted to enjoy the benefits conferred by its charter without incurring the responsibilities incident thereto"** (page 404).

"Such companies," as was said by this Court in *Gibbes v. Consolidated Gas Co.*, 130 U. S., 396, 32 L. Ed., 979 and 985, "entered the streets . . . , under their charters, in the exercise of the equivalent of the power of eminent domain, and **are to be held as having assumed an obligation to fulfill the public purposes to subserve which they were incorporated."**

"A public service corporation, by accepting the rights and privileges conferred by its act of incorporation and by entering into the enjoyment of its franchises, undertakes to perform all the public duties required of it. . . ."

Weld v. Gas & Elec. Light Com., 197 Mass., 556, 84 N. E., 101, quoted in *Attorney General v. Haverhill Gas Light Co.*, 215 Mass., 394, Ann. Cas., 1914-C., 1266.

The principle really involved in this case is that a public service corporation may be required to perform or maintain a service embraced within its charter, even at a loss if need be, as long as it retains any of the benefits of the charter. (245 U. S., 345; 62 L. Ed., 337; 269 U. S., 244, 70 L. Ed., 255; 216 U. S., 262, 54 L. Ed., 472; 206 U. S., 1, 51 L. Ed., 933.) It does not question the principle that an insolvent railroad company with a purely permissive charter, when it can only operate at a continued loss, and when it has entirely given up its charter rights, cannot be required to continue operation—which principle so strenuously contended for by appellants, is cheerfully conceded by us. This concession fully explains all the cases chiefly relied on by appellants where abandonment was really allowed. (*The Texas case*, 264 U. S., 79, 68 L. Ed., ——, *Jack v. Williams*, 145 Fed., 281; *Charleston Isle of Palms Tr. Co. v. Shealy*, 266 Fed., 406.) We are not unmindful of the decision in the *Brooks-Scanlon case*, 251 U. S., 396, 64 L. Ed., 323, but that case did not involve a public service corporation. This of course makes a vital difference. Where however a public service corporation retains the benefits of its franchise, it is uniformly held that it may be compelled to perform, the question of profit or loss being referred to its operations, as a whole.

This principle is illustrated by the following among innumerable other cases:

United Fuel Gas Company v. Railroad Commission of Ky., 278 U. S., 300, 73 L. Ed., 390; *New York ex rel. New York & Queens Gas Co. v. McCall, et al.* (*Public Service Commis-*

sion of the State of N. Y.), 245 U. S., 345, 62 L. Ed., 337; *Missouri Pac. R. R. Co. v. Kansas*, 216 U. S., 262, 54 L. Ed., 472; *A. C. L. R. Co. v. North Carolina Corp. Commission*, 206 U. S., 1, 51 L. Ed., 933; *Woodhaven Gas Light Co. v. Public Service Commission of N. Y.*, 269 U. S., 244, 70 L. Ed., 255; *Puget Sound Traction, Light & Power Co. v. Reynolds*, 244 U. S., 574, 61 L. Ed., 1325; *St. Louis & San Francisco Ry. Co. v. Gill*, 156 U. S., 649, 39 L. Ed., 567; *Fort Smith Light & T. Co. v. Bourland*, 267 U. S., 330, 69 L. Ed., 631; *Milwaukee Electric Ry. & Light Co. v. State of Wisconsin*, 252 U. S., 100; 64 L. Ed., 476; *Chesapeake & O. R. Co. v. Public Serv. Com.*, 242 U. S., 603; 61 L. Ed., 520; *Brownell, et al. v. Old Colony R. R. Co.* (Mass.), 29 L. R. A., 169; *Gibbes v. Consolidated Gas Company*, 130 U. S., 396, 32 L. Ed., 979; *Attorney General, ex rel. Corporation Com. v. Haverhill Gas Light Co.*, 215 Mass., 394, Annotated cases 1914-C, p. 1266; *Harmon v. Columbia & Greenville R. R. Co.*, 28 S. C., 401; *McCandliss v. R. R. Co.*, 38 S. C., 103; *Spartanburg v. S. C. Gas & E. Co.*, 130 S. C., 125.

In the above cited *United Fuel Gas Company case*, 278 U. S., 300; 73 L. Ed., 390, the appelant company was a West Virginia corporation, which also did a gas business in the State of Kentucky. After an order had been passed by the Railroad Commission of Kentucky reducing the previous prevailing rates in certain cities in Kentucky to 80% of the former rate, the company then organized a subsidiary company in Kentucky known as the Warfield Company, which thereafter petitioned the commission to permit higher rates or in the alternative to permit it to withdraw such service from these cities. The Commission denied the petition, and the District Court affirmed the action of the Commission.

It was claimed by the company that this required it to operate at a loss and deprived it of its property without due process.

This Court held that the Company could lawfully be required to continue to perform the public service in question as long as it continued to do business in the State.

"The primary duty of a public utility," said the Court, "is to serve on reasonable terms all those who desire the service

it renders. **This duty does not permit it to pick and choose and to serve only those portions of the territory which it finds most profitable, leaving the remainder to get along without the service which it alone is in a position to give."** . . . . and if a public service company may not refuse to serve a territory where the return is reasonable, or even in some circumstances where the return is inadequate, but that on its **total related business is sufficient** (*Atlantic Coast Line R. Co. v. North Carolina Corp. Com., supra*, at p. 25 (51 L. Ed., 944; 27 Sup. Ct. Rep., 585; 11 Ann. Cas., 398). *Missouri P. R. Co. v. Kansas, supra*, at p. 277 (54 L. Ed., 478; 30 Sup. Ct. Rep., 330), it goes without saying that it may not use its privileged position, in conjunction with the demand which it has created, as a weapon to control rates by threatening to discontinue that part of its service if it does not receive the rate demanded. The powers of the state, so far as the Federal Constitution is concerned, were not exceeded by the action of the commission, in compelling appellants to continue their service in the cities named so long as they continued to do business in other parts of the state, and to there avail of the extraordinary privileges extended to public utilities" (p. 396).

In this case the Court also held that in calculating the rate to be allowed, the regulated gas business should be credited with 50% of the proceeds of the sale of the gasoline extracted in the earlier stages of its production, though the company had organized a subsidiary company to handle such gasoline and had reserved for itself only one-eighth of the profits from the gasoline end of the business. This ruling was based upon the ground that there was a joint use made of the property of the company in the production of the different phases of its operation, and that consequently the profits therefrom must be fairly prorated. "In the production of this gasoline, therefore, joint use is made of the gas, gas field and certain facilities of the gas company. **This joint use requires a prorating of joint investment and expenses, and of the return from the enterprise"** (page 400-401).

This case is important not only as showing the obligation of a public service company to continue its service, but as showing

the duty of such a company to prorate the income to the various branches of its operation from property jointly used for such branches.

The principles of the foregoing cases were applied by the South Carolina Supreme Court in the case of *Spartanburg v. S. C. Gas & Electric Company,* 130 S. C., 125, the case which in principle is on all fours with the case at bar. In that case the company was denied the right to abandon the electric railway service because the franchise to carry on the several services had been originally granted by one ordinance.

The ordinance conferring the franchise in that case was in all essential respects identical with the State charter (particularly when supplemented by the Columbia City ordinances) conferring the franchise in the case at bar. The ordinance in Section 1 conferred the right "to construct, maintain and operate a street railway" in Spartanburg and "to operate the same by electricity . . ., including erection and building of poles and wires in the street," and in Section 12 also granted "the right and authority to lay, construct, erect, maintain and operate, pipes, poles and wires through . . . the streets of the City of Spartanburg for the purpose of supplying light, power and heat through the means of electricity, gas, or either of them, to the public . . ." and in Section 15 provided that the duration of the grant "should continue for the period of forty years from the date hereof." (Rates were apparently also provided for in the said ordinance and an acceptance was required, but for the purposes of this question these facts appear to us to be entirely immaterial.)

In that case the Company undertook to abandon the electric railway service alone on account of alleged losses extending over the period of years from 1918 through 1922 amounting to nearly $400,000.00.

The Supreme Court of South Carolina notwithstanding issued the writ of mandamus directing the resumption of service, basing its decision upon the inseparability of the electric railway from the electric light and power franchise, arising both from the contract and also from the physical connection of the branches of the service.

"It will be observed," said the Court, "that three businesses are included in this one ordinance, and they are linked together in its contract. Whatever may be said about the separateness of the gas franchise, the electric light and power business is linked to its electric railway business. The respondent admtis that its electric light and power franchise is valuable and it is a paying business.

"If the street railway does not pay with all the advantages it derives from its electric light and power adjunct, then an electric railway alone must fall. It is inevitable that Spartanburg must be without a street railway, if the respondent be allowed to keep the one and destroy the other. They stand or fall together as an entire contract. It could not be held that if A makes a contract to buy from B a certain tract of land of 100 acres, at $100.00 per acre, A could force B to reserve 10 acres of bone and pay him only $9,000.00 for the 90 acres of good land. The contract is one transaction, and the $1,000.00 paid for the 10 acres of worthless land is not confiscation. The 10 acres may be separated from the 90 acres, but the railway and power business cannot be separated" (pp. 129–130).

We earnestly submit that the reasoning of that case is entirely sound and should be adopted by this Court as it was in the instant case by the South Carolina Supreme Court.

This decision of the Supreme Court of South Carolina is entitled to peculiar weight in this case. It was evidently in view of this decision that the appellant companies, which also acquired the Spartanburg properties there involved (R., 408), undertook to effect a separation of the electric railway from the electric light and power business in this case.

The writ of error in this Spartanburg case was dismissed by the United States Supreme Court on the company's motion on November 20, 1924. (See 266 U. S., 639; 69 L. Ed., 482.)

The same principle was applied in the other cases cited above in the *Chesapeake & O. R. Co. case, supra*, in which an order of the commission requiring the company to install and maintain a passenger service on the branch line was sustained, notwithstanding the operation of such line would result in a loss.

In the *Atlantic Coast Line case, supra,* which is one of the leading cases on this subject, this Court upheld the power of the Commission to order the company to put on and maintain a train so as to make connections with the Southern Railway at Selma, notwithstanding it was conceded that the operation of such connecting train in itself would necessitate a daily loss.

"That power as we have seen," said the Court, "takes its origin from the *quasi* public nature of the business in which the carrier is engaged, and embraces that business in its entirety . . ."

"This is so because, as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although, by doing so, as an incident some pecuniary loss from rendering such service may result . . . As the duty to furnish necessary facilities is coterminous with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the charter of the services required, and the public need for its performance."

So, we submit that under the principle of this decision the duty to furnish the electric railway transportation is "coterminous with the powers of the corporation," and in considering the question of whether the company should be ordered to restore the electric railway business, the Court must consider the "productiveness of the corporate business as a whole."

This decision had followed the case of *Minneapolis & St. Louis Ry. Co. v. State of Minnesota,* 186 U. S., 257; 46 L. Ed., 1151, in which the Court had upheld a rate on carload lots "provided the companies are able to earn a fair profit upon their entire business."

In the *Missouri P. R. Company case, supra,* which was also one of the leading cases on this subject, the Company was ordered to install a passenger service on a line from Madison, Kansas, to the Missouri State line, even though such line could be operated only at a loss. The decision was placed upon the ground that the duty to operate such service was incidental

to the corporate existence of the Company, and the question of loss must be referred to the entire system. The Court said that it was not necessary to review the finding of fact by the State Court as to the earnings of the entire system, even if it had the power to do so, adding:

> "We say this because, when the controversy here presented is properly analyzed, the first and pivotal question arising is whether the order complained of did anything more than command the railroad company to perform a service which it was incumbent upon it to perform as the necessary result of the possession and enjoyment of its charter powers, and which it could not refuse to perform as long as the charter powers remained and the obligation which arose from their enjoyment continued to exist. . . ."

The Court then after comparing the decision in the *Atlantic Coast Line case* above discussed, concluded by saying:

> "But where a duty which a corporation is obliged to render is a necessary consequence of the acceptance and continued enjoyment of its corporate rights, those rights not having been surrendered by the corporation, other considerations are, in the nature of things, paramount, since it cannot be said that an order compelling the performance of such a duty at a pecuniary loss is unreasonable. To conclude to the contrary would be but to declare that a corporate charter was purely unilateral; that is, was binding in favor of the corporation as to all rights conferred upon it, and was devoid of obligation as to duties imposed, even although such duties were the absolute correlative of the rights conferred. . . ." (54 L. Ed., 479-480.)

This case shows the inherent obligation of a public service corporation to perform the services authorized as the correlative of the rights conferred. It also indicates the force and effect, which we submit should be given to the findings of fact by the State Supreme Court.

In the *Puget Sound case, supra* (244 U. S., 574), this Court upheld the order of the Commission, though it was conceded that the order would require the street railway company to operate certain lines at a loss. The company contended that it could not be required to operate under the order, particularly as these lines had formerly belonged to other companies whose property had been taken over and consolidated. "But," the Court held, "we cannot accede to the suggestion that the question whether the Commission's order is confiscatory or otherwise arbitrary within the inhibition of the 14th Amendment is to be determined with reference alone to the Alki, the Fauntleroy, or the Ballard beach lines. **These are and long have been operated by plaintiffs as parts of a system comprising 200 miles of tracks.**"

The Court then held the *Northern P. R. Co. v. North Dakota case* inapplicable, saying the case was controlled rather by *St. Louis & S. F. R. Co. v. Gill*, 156 U. S., 649, 39 L. Ed., 567, where it was held:

> " . . . that the correct test was as to the effect of the act on the defendant's entire line, and not upon that part which was formerly a part of one of the consolidating roads; that the company cannot claim the right to earn a net profit from every mile, section, or other part into which the road might be divided, nor attack as unjust a regulation which fixed a rate at which some such part would be unremunerative; . . . "

This principle was also illustrated and applied in the above cited *Fort Smith case (supra)*, in which the Company was required to rebuild and regrade a line even at a loss; also in the *New York & Queens Gas Company case (supra)*, in which the Company was required to extend its gas service into a community where the present conditions indicated the returns would be inadequate to meet the expenditure required, the Court saying:

"Corporations which devote their property to a public use may not pick and choose, serving only the portions of

the territory covered by their franchise which it is presently profitable for them to serve, and restricting the development of the remaining portions by leaving their inhabitants in discomfort without the service which they alone can render."

In this case the Court commented on the fact that it was one of the "important purposes" of the Commission "to correct this disposition (of such companies) to serve where it is profitable and to neglect where it is not," and that Courts were "without authority to substitute for its (the Commission's) judgment their views of what may be reasonable and wise."

To the same effect see the similar *Woodhaven Gas Light Co. case*, 269 U. S., 244, 70 L. Ed., 255.

(Charter of 1891 Embraced Electric Railway-Light-and-Power Service.)

Applying these principles to this case we see that the companies cannot be allowed to abandon the electric railway service.

First, the charter, particularly when taken in connection with the City ordinances enacted in pursuance of its requirements, imposed a positive duty to operate. (Clearly the State charter-franchise must be construed in connection with the City ordinances. The right to operate in Columbia granted by the State was conditioned upon obtaining the City's consent. This consent was sought and obtained pursuant to said charter, and the charter and ordinances accepted and acted upon by the company. This of course made the ordinances a part of the charter powers and obligations.)

Now the right acquired by the company (formerly conferred upon the Columbia Electric Street and Suburban Railway and Electric Power Company) "to . . . provide electric power for any . . . purposes" (Section 5, page 812) and "to operate their cars . . . with electric power . . ." (Section 6) was expressly made subject to the proviso "that

said company begins to operate its railway in said city within five years" (Section 8).

The ordinances expressly provided, among other things "It shall be the duty of the company on week days to run a car for passengers at least every hour from 7:00 a. m. to 9:00 p. m. . . . ." and also prescribe a penalty for neglect or refusal "to run their passengers cars as herein provded" (Section 555, page 836). They further, particularly reserved the right to City Council to regulate by ordinances the manner of operating said electric railway and to alter and amend the ordinances relating thereto as in their judgment the public welfare might demand (Section 565, page 840).

The Act of 1920 (31 Stat., 741-742) now appearing as Section 5059 of the Code of 1922, Chap. 54, entitled "Street and Suburban Railways," provides *inter alia*, under the caption "Conditions of Cars—Number—Duties of Railway Commission—Tracks and Structures"—"All corporations operating electric railways shall have and **keep in constant operation** a sufficient number of cars, convenient, comfortable and clean cars, to transport the usual number of persons desiring transportation." (Code of 1922, p. 1532.)

The original charter granted to this company was subject, under the Constitution of 1868 to amendment (Art. 12, Sec. 1), and also likewise under the statutes then in force. (19 Stat., 546) Code 1922, Sec. 4250.

This provision, therefore, became a part of the charter obligations of the company.

See *Tomlinson v. Jessup*, 82 U. S., 454, 21 L. Ed., 204.

McCandlish v. R. R. Co., 38 S. C., 103 at 113.

Also the effect of the Act of 1891, creating the Columbia Electric Street Railway, Light & Power Company, was to confer upon one corporation the consolidated public utility privileges for this community, the electric railway, electric light and electric power (and gas). It was a consolidated grant of electric privileges, street railway, light and power, inseparably linked.

The object of this consolidation was that the public might be better served with these public utilities. The object was primarily the public benefit. The electric railway privileges were granted in order that the electric light and power business might more usefully serve the public; the electric light and power privileges were granted in order that the electric railway phase might better serve the public. "These special privileges," as was said by the Circuit Court of Appeals about this very company (27 F. (2nd) 52, "were conferred upon them . . . in consideration of their providing facilities for communication and intercourse with the public."

Whatever may have been the case before acceptance, we submit that when the corporation accepted these consolidated privileges and acted upon them, and built and constructed its electric power plants, sub-stations, electric lines, poles and other electric railway facilities, all as parts of one electric business, it can not now be permitted to separate the electric railway from the electric light and power phases of the franchise.

Moreover, the acceptance of this charter-franchise from the State for the operation of this combined public service certainly created a contract between the State of South Carolina and the company.

"All Courts at this day are estopped from questioning the doctrine . . ."

Chemango Bridge Company v. Binghamton Bridge Co., 18 L. ed., 137, at 142, 70 U. S., 51; *New Orleans Light Company v. La. Light, etc., Mfg. Co.*, 115 U. S., 650, 29 L. Ed., 516.

This being true, it necessarily follows from the nature of a contract that the company must perform all the services. It is elementary that a contract must be treated as an entirety.

Thus if a School Board should employ one to teach the subjects of Latin, History, and Mathematics, and furnish to such teacher a building in which to carry on such instructions, can it be supposed that the teacher would have the right thereafter to abandon the teaching of Mathematics if he should find it more burdensome and less profitable, and yet be allowed to continue the privilege of teaching Latin and History? The situation

here is analogous. The company was employed for the purpose of carrying on the electric street railway, light and power services in this community, and the State furnished the company with the facilities and with its patronage. Can it now reasonably be supposed that the company shall be allowed to abandon the electric street railway branch of its obligations at its option, and yet continue the privilege of supplying electric light and power, and still make use of the State franchise and of the assets and property furnished by the State?

"When a special act of incorporation has been accepted according to its terms, . . . **a binding contract between the state on the one hand and the incorporators and corporation on the other results, so that all the rights, duties, and liabilities expressed or implied in the act attach, and cannot thereafter be withdrawn or impaired by the state in violation of the grant or cast off by the incorporators or the corporation without the consent of the state** . . ." (14 C. J., 110).

Also the record shows, and the South Carolina Supreme Court found, that the electric railway is inseparably connected with the electric light and power business, by the manner of its physical construction and operation as well as by the charter franchise contract.

During the thirty years of joint operation the company has constructed and/or acquired power plants, sub-stations, poles and wires and rights-of-way. This property was constructed with funds from the joint operation. It obviously cannot now be separated and used exclusively for electric light and power purposes.

"This joint use requires a prorating of joint investment and expenses, and of the return from the joint enterprise."

United Fuel Gas Company v. Railroad Commission of Ky., 278 U. S., 300, 73 L. Ed., 390.

On account of such construction and joint operation all this electric system has, we submit, as was said in the *Chesapeake & Ohio case* (*supra*) (about passenger and freight service) be-

come **"devoted to the transportation of passengers as well as"** to the distribution of light and power. **"The obligation to use it for both was imposed by law,** and so could not be thrown off or extinguished by any act or omission of the . . . Company" (page 522).

We therefore submit that the company is under an obligation to continue the service—both on account of the language of the charter (and ordinances) and of the nature and inseparability of the services authorized.

> "To conclude to the contrary would be but to declare that a corporate charter was purely unilateral; that is, was binding in favor of the corporation as to all rights conferred upon it, and was devoid of obligation as to duties imposed, even although such duties were the absolute correlative of the rights conferred . . . (216 U. S., 262, 54 L. Ed., at 479)."

If there were any doubt about the construction of this charter, then we submit that "Grants of franchises are strictly construed in favor of the public . . . Where a grant is susceptible of two meanings, one restricting and the other extending the powers under a franchise, that construction is to be adopted which works the least harm to the state . . ." (26 C. J., 1031–1033).

Cf. *Blair v. Chicago*, 201 U. S., 400; 50 L. Ed., 801.

FRANCHISES CONSOLIDATED BY ACT OF 1891

We submit there is no merit in the company's present contention that the franchises were not combined or consolidated by the Act of 1891.

In this connection we have this striking situation: That whereas the companies by their joint answer admitted that the franchises had been consolidated by the Act of 1891 (R., 14), but claimed that they had been separated under the Merger Act (R., 23), the companies seem now—after the adverse ruling by the Referee and the Court as to the attempted separation—to rely principally on the contention, first injected into the

case by the report of the Referee, that the franchises were never consolidated and combined by the Act of 1891. This represents a significant change of front.

The Act of 1891 by its terms clearly provided for the consolidation of the electric street railway and power franchise, formerly granted to the "Columbia Electric Street and Suburban Railway and Electric Power Company," with the gas and electric franchise, formerly granted to the "Congaree Gas & Electric Company," and authorized the consolidated company to purchase the street railway property and franchise (without any electric features) of the Columbia Street Railway Company. The Act by its terms says that the two first companies "have agreed to **consolidate** the property, franchises and privileges owned and held by them," and then authorized them to consolidate their property, franchises and privileges into a new company, the Columbia Electric Street Railway, Light and Power Company, an entirely new company. (Section 1.) The name is different from that of either of the consolidating companies and the name is significant as indicating the business it is to do. It is to be noted that the Act authorized the consolidation of the two first companies and the purchase of the other. The Act then said (Section 2) that upon such consolidation, the consolidated company should "be vested with all the rights, franchises, powers and privileges conferred upon the consolidating companies" by the former Acts, and, upon the purchase of the old Columbia Street Railway Company, "should be vested with all the rights, powers, franchises and privileges" formerly conferred upon that company. The Act further conferred all these powers constituting this consolidated franchises upon the consolidated company for a period of fifty years, whereas the franchises granted to the former companies had been limited to thirty years from the dates of their incorporation respectively (R. 809).

The companies effected the consolidation and the purchase authorized (see Exhibit 10, p. 13), and thereupon the old companies, as was stated in the "Report" on the company, went "out of existence by reason of the consolidation." (See Exhibit 10, p. 9.)

This Act therefore, we submit, clearly created a new corporation, and hence the company derived and held all its powers thereafter from said Act of incorporation just as though the old companies had never been created or existed.

> "According to the prevailing view statutes providing for the consolidation of corporations are to be treated as acts of incorporation, and on consolidation being effected under their provisions, the constituent companies, unless such an intention is excluded by the language of the statute, are deemed to be dissolved, and their powers and faculties, to the extent authorized, become vested in the consolidated company as a new corporation created by the act of consolidation. The new corporation is an entity distinct from any of its constituents, and draws its life from the act of consolidation. The fact that the powers of the new company are conferred upon it by a reference to the powers and privileges of the old companies does not affect this result. The powers are not for that reason, mere continuations of the powers of the old corporations, nor is the new corporation, for that reason, any less an entity distinct from the constituent companies." (7 R. C. L., 170.)

Citing the following among other authorities:

Clearwater v. Meredith, 1 Wall., 25, 17 U. S. (L. Ed.), 604. *Central Railroad, etc., Co. v. Georgia*, 92 S. U., 665, 23 U. S. (L. Ed.), 757. *Shields v. Ohio*, 95 U. S., 319, 24 U. S. (L. Ed.), 357. *Maine Cent. R. Co. v. Maine*, 96 U. S., 499, 24 U. S. (L. Ed.), 836. *Atlantic, etc., R. Co. v. Georgia*, 98 U. S., 359, 25 U. S. (L. Ed.), 185. *St. Louis, etc., Ry. Co. v. Berry*, 113 U. S., 465, 5 S. Ct., 529, 28 U. S. (L. Ed.), 1055. *Pullman's Palace Car Co. v. Missouri Pac. R. Co.*, 115 U. S., 587, 6 S. Ct., 194, 29 U. S. (L. Ed.), 499. *Minneapolis, etc., R. Co. v. Gardner*, 177 U. S., 332, 30 S. Ct., 656, 44 U. S. (L. Ed.), 793. *Yazoo, etc., R. Co. v. Adams*, 180 U. S., 1, 21 S. Ct., 240, 45 U. S. (L. Ed.), 396. *Chicago Title, etc., Co. v. Doyle*, 259 Ill., 489, 102 N. E., 790, 47 L. R. A. (N.

S.), 1066. Notes: 89 A. S. R., 612, 2 L. R. A., 564; 3 L. R. A., 435; 8 L. R. A., 499. Note: 89 A. S. R., 613, 614.

This principle of law was announced by this Court many years ago and has become the settled ruling of this Court.

Atlantic, etc., Railroad Co. v. Georgia, 98 U. S., 359, 25 L. Ed., 185. *Memphis, etc., Railroad Co. v. Berry*, 112 U. S., 609, 28 L. Ed., 837. *Chesapeake & Ohio Railroad Co. v. Miller*, 114 U. S., 176, 29 L. Ed., 121. *Wabash, Saint Louis, etc., Railroad Company v. Ham*, 114 U. S., 587, 29 L. Ed., 235. *Pullman Palace Car Company v. Missouri Pacific Railroad Co.*, 115 U. S., 587, 29 L. Ed., 499. *Keokuk and [illegible]. R. Company v. Missouri*, 152 U. S., 301, 38 L. Ed., 450. *Louisville Water Co. v. Clark*, 143 U. S., 1, 36 L. Ed., 55.

In the above cited *Atlantic & Gulf R. R. Co. v. Georgia* (25 L. Ed., 185), the Court held that as a result of such an act of consolidation, the consolidated company held its franchises solely as a result of such consolidated act.

> "It is therefore, a vital question," said the Court as to the consolidation, "what was its effect? Did the consolidated companies become a new corporation, holding its powers and privileges as such under the Act of 1863? . . . Looking thus at the Legislative intent appearing in the consolidation act, we are constrained to the conclusion that a new corporation was created by the consolidation effected thereunder in the place and in lieu of the two companies previously existing, and that whatever franchises, immunities or privileges it possesses, it holds them solely by virtue of the grant that Act made. That generally the effect of consolidation, as distinguished from any union by merger of one company into another, is to work a dissolution of the companies consolidating, and to create a new corporation out of the elements of the former, is asserted in many cases and it seems to be a necessary result."

This Court also in the subsequent case of *Rochester v. City of Rochester*, 205 U. S., 236, 51 L. Ed., 784, pointed out that where the old companies cease to exist the franchises of the consolidated company are to be held as having been conferred

by the Act of consolidation. The Court in that case also upon that ground distinguished *Tomlinson v. Branch*, 15 Wall., 460; *Central R. & Bkg. Co. v. Georgia*, 92 U. S., 665, and the other cases relied upon by petitioners herein, in that in such cases the old corporations *continued "to exist* as a corporation that ground distinguished *Tomlinson v. Branch*, 15 Wall., 460; *Central R. & Bkg. Co. v. Georgia*, 92 U. S., 665, and the other cases relied upon by petitioners herein, in that in such cases the old corporations continued "to exist as a corporation owning and operating its property by virtue of its own charter."

Also the South Carolina Supreme Court had previously held in the case of *Railroad Co. v. Gibbes Treas.* (27 S. C., 385), in regard to a similar consolidation Act, "the consolidation, however, in 1869 dissolved the two original companies and created an entirely new company—the appellant—with rights and privileges not dependent or derived from the charters of the original companies, but upon the Act authorizing the consolidation and the law governing corporations at the time."

It will readily be seen upon examination that all the cases cited by the appellants (15 Wall., 460, 21 L. Ed., 757; 10 How., 376, 13 L. Ed., 461; 18 Wall., 206, 21 L. Ed., 888; 92 U. S., ..., 23 L. Ed., 757; 92 U. S., 677, 27 L. Ed., 750; 94 U. S., 714, 24 L. Ed., 310; 109 U. S., 104, 27 L. Ed., 872) are entirely inapplicable to the case at bar, except so far as they support our position, and may be distinguished upon the ground that the consolidating companies were expected to continue to exist with their separate charters, powers and functions.

In considering this question also we call attention to the fact that franchises are to be strictly construed, and that construction adopted which works the least harm to the public. (*Blair v. Chicago*, 201 U. S., 400, 50 L. Ed., 801; *Northwestern Fertiliser Co. v. Hyde Park*, 97 U. S., 659, 24 L. Ed., 1036; *Slidell v. Grandjean*, 111 U. S., 412.)

Also it must be noted that in the *Missouri P. R. Co. v. Kansas*, 216 U. S., 262, 54 L. Ed., 472; and *Puget Sound T. L. & P. Co. v. Reynolds*, 61 L. Ed., 1325, the Court applied

the principles as though the companies held all their privileges under one charter, without even discussing the effect of the consolidations therein involved. The same principle was applied by the Massachusetts Supreme Court in the case of *Brownell et al. v. the Old Colony Railroad Co.*, 29 L. R. A., 169, wherein the Court held that the ferry franchise had been blended with the Railroad Company franchise, and therefore could not be separately abandoned.

We submit therefore that the Act of 1891 conferred a combined and consolidated franchise upon the company for the operation of the electric railway, light and power services, deriving all its powers and privileges from such Act.

Clearly it was not necessary for the Act to declare in terms that one service should not be exercised except in connection with the others. This followed as a necessary result of the single grant, to the one company. This was the major purpose of the consolidation—for the greater benefit of the public.

The South Carolina Supreme Court has construed this Act of 1891 as granting a consolidated franchise for the operation of the electric street railway, light and power business as one business. Construction of such State Statute is "a matter primarily for determination by the local Courts."

Gilchrist v. Interborough Rapid Transit Co., 279 U. S., 159, 73 L. Ed., 652 (at 664).

Petitioners' Cases Inapplicable.

Taking it to be established that the electric railway is an inseparable part of the business operated under the electric railway, light and power franchise of petitioners, we submit, it is apparent that none of the cases relied upon by the petitioners are applicable.

Indeed upon analysis all these cases will be found to recognize the principle that the grantee of a franchise cannot evade the responsibilities while retaining the benefits thereof.

The language of every decision must be interpreted in the light of the facts of the case involved. It will be seen that the facts of all the cases relied upon and cited by petitioners are utterly different from the facts in the case at bar.

The case of the *Railroad Commission v. Eastern Texas Railroad Co.*, 264 U. S., 79, 68 L. Ed., 569, relied upon and quoted extensively by appellants, dealt only with an ordinary steam railroad, the charter for which had been taken out under a general law of the State of Texas, and which, of course, contained no electric light or power or other public utility features. The company had been organized primarily for the purpose of developing a lumber industry in the section in question, but about 1917, some time before the commencement of this action, the supply of timber had been exhausted, the lumber industry closed, and the people formerly employed therein moved away. It was conceded by the State of Texas in the United States Supreme Court that under these circumstances the road could not be compelled to operate, and this action was really prosecuted to recover damages against the company for failure to operate the road. The opinion is expressly predicated upon the company's having the "usual permissive charter of a railroad company," which is certainly not the kind of charter which the petitioners enjoy.

It is needless to elaborate the points of distinction between that case and the case at bar. Moreover the case recognizes that so long as a company "continues to exercise the privileges conferred by its charter, the State has power . . . to require it to provide . . . adequate facilities for serving the public even though compliance be attended by some pecuniary disadvantage." The decision was expressly based upon the ground that the company had entirely ceased to exercise the privileges conferred by its charter.

The *Brooks-Scanlon Co. v. Railroad Commission*, 251 U. S. 396, 64 L. Ed., 323, referred to in the above *Texas* case was a very similar case. There the company involved was organized primarily to "manufacture and deal in lumber and to carry on other incidental business." "The road," as the Court said, "was primarily a logging road, but it may be assumed to have done business for third persons as a common carrier." The company was therefore not in any sense primarily a public service corporation, but was essentially an ordinary private corporation doing only a small amount of business as a common carrier incidental to its lumber and logging business. When therefore

the timber of the company had been cut and there was no longer any deed of the railway business as "incidental" to its lumber business, the company was allowed to discontinue the railway because it was giving up its entire public service privileges. The Court expressly said:

> "It is true that if a railroad continues to exercise the power conferred upon it by a charter from a State, the State may require it to fulfill any obligation imposed by the charter, even though fulfillment in that particular may cause a loss. *Missouri P. R. Co. v. Kansas*, 216 U. S., 262, 276, 278; 54 L. Ed., 472, 478, 479; 30 Sup. Ct. Rep., 330" (page 326).

The Electric Street Railway-Light-and-Power Company here involved is certainly continuing "to exercise the powers conferred upon it by its charter from the State" and so falls within this principle recognized in the above case.

The case of *Bullock v. State of Florida*, 254 U. S., 513; 65 L. Ed., 380, also dealt with a logging road, and merely involved the question of whether a decree for the foreclosure of a mortgage on such road could properly provide for the privilege of dismantling. As a matter of fact the decision of the Supreme Court of Florida (58 Fla., 321, 8 A. L. R., 322), prohibiting the sale with the privilege of dismantling was not disturbed by the United States Supreme Court.

The case of the *Illinois Trust & Saving Bank v. Doud*, 105 Fed., 123, 52 L. R. A., 481, relied upon by petitioners really involved the question of whether one who had advanced money for the erection of an addition to the power plant of the company was entitled to a priority in the distribution of the assets of the corporation which was in the hands of a receiver under foreclosure proceedings. Therefore the quotation cited by petitioners was obiter dictum.

It was moreover recognized and stated in the opinion that the franchise of a corporation may be forfeited "for such a misuse or nonuse" of the powers or privileges contained in its organic law as "results in a substantial failure to fulfill the design and purpose of its organization." Citing many cases (91 Iowa, 517;

32 Ohio State, 487; 10 Ohio, 535; 51 Miss., 602; 73 Ill., 541; 5 Ark., 595; 9 Mo. App., 114).

Under the principle of this case we earnestly submit that the franchise of respondents can be forfeited because the non-operation of the electric railway certainly "results in a substantial failure to fulfill the design and purpose of its organization."

The other cases from the United States Court referred to in some of the decisions relied upon by petitioners, *Northern P. R. Co. v. North Dakota*, 236 U. S., 585; 59 L. Ed., 741; *Norfolk & W. R. Co. v. West Virginia*, 236 U. S., 605; 59 L. Ed., 745, merely involve the question of the adequacy of rates fixed by State statutes, and appear to us to be irrelevant—they do not touch the question of the abandonment of any of the primary purposes for which the corporation was created. The same is true of the subsequent case of *Chicago M. & St. Paul R. R. Co. v. Public Utilities Co.*, 71 L. Ed., 1085; 274 U. S., 344.

We do not deem it necessary to discuss in detail the other cases or authorities cited. *Mt. Carmel Public Utility & S. Co. v. Public Utility Com.*, 297 Ill., 303; 21 A. L. R., 571; *Northern Illinois L. & T. Co. v. Illinois Commerce Company*, 302 Ill., 11; 234 N. E., 132; *Trinidad Electric Trans. Ry. & Gas Co.*, P. U. R., 1922-C, 299, further than to say that in none of them does it appear that an electric railway constructed and operated for many years under an electric street railway, light and power (and gas) franchise from City or State has been allowed to be abandoned.

As to the *Mt. Carmel case*, 297 Ill., 303, 21 A. L. R., 372, it appears from the report of the case that the right of the company to carry on the heating branch of its service was obtained under a different ordinance from the right to carry on the other public services. Moreover the case expressly recognizes the general principle that "a corporation may be required to fulfill an obligation imposed by its charter even though it may be done at a loss." The decision of the case was also based in part upon the fact that the order of the commission was not based upon any findings of fact. Nor is there any showing

in the *Northern Illinois L. & T. Co. v. Illinois Commerce Commission*, 302 Ill., 11, that the right to carry on the electric street railway business was a part of any general franchise granted by the State to carry on such business as a part of its general electric street railway and power business.

It may be conceded that there are no decisions of this Court on the precise question here discussed, that is, as to the abandonment of the electric railway phase of an electric street railway, light and power franchise. The *Texas Railway Company case, supra*, did not involve any such consolidated franchise, and the *Brooks-Scanlon Company* was not even a public service corporation. We think, however, that the weight and principle of the decisions of this Court hereinbefore cited by us are against allowing such abandonment.

Public Utility Cannot Abandon Branch of Charter Purposes Because of Loss.

It is argued that this would require the other branches to make up the loss, and that under the *Northern Pacific* (236 U. S., 585), and the *Brooks-Scanlon cases* (251 U. S., 296), one class of patrons of a public utility can not be made to pay a higher rate for the benefit of another class. But this argument is, we submit, entirely erroneous—the answer to it is perfectly clear. **The owners of the public utility must accept smaller dividends, must absorb the loss, if they do not choose to give up the charter.** The other branches need not be required to make up the loss; the other branches need not be required to pay any higher rate. The Constitution does not guarantee the owners of a public utility any particular return on their investment.

Fort Smith L. & T. Co. v. Bourland, 267 U. S., 330, 69 L. Ed., 631 (saying):

> "A railway may be compelled to continue service of a branch or part of a line although the operation involves a loss. . . . This is true even where the system as a whole fails to earn a fair return upon the value of the property."

See also to the same effect *Milwaukee Electric Ry. & P. Co. v. Wisconsin*, 252 U. S., 100, 64 L. Ed., 476, and *Woodhaven Gas Light Co.*, case 269 U. S., 244, 70 L. Ed., 255.

It may be conceded that, if it were merely a question of rates, the rates cannot be so adjusted as to favor one class of patrons at the expense of another—which is all that was really involved in the *Northern Pacific case*. **But this is not a rate case.** The question here is whether a public utility chartered for certain purposes can abandon one of those purposes while retaining the benefit of that charter; whether a public utility can retain the more profitable but escape the present by less profitable phases of its franchise; whether a public utility can abandon a public service which it alone is in position to render and leave the public to suffer.

Can a railroad company abandon its passenger service on account of loss while retaining the profitable freight business? This question has been answered in *Missouri Pacific; the Chesapeake & Ohio*, and other cases. The situation here is in principle identical. Can this Electric street-railway-light-and-power company—its primary purpose having been clearly indicated in its original name—abandon the electric railway service while retaining all the necessary electrical features for its operation, and permanently deprive the City of Columbia and community of this essential service? The answer has been emphatically given by this Court in the foregoing *Atlantic Coast Line, Missouri Pacific, New York & Queens Gas Co., Woodhaven Gas Co., Chesapeake & Ohio*, and *United Fuel Gas Company, cases*—to the effect that (paraphrasing) "the primary duty of a public utility to serve does not permit it to pick and choose and serve only where it is most profitable"; "leaving the remainder" "in discomfort" "without the service which it alone is in position to give," and this duty "cannot be avoided merely because it will be attended by some pecuniary loss."

Moreover, even if this were a rate case, then it would be necessary to appraise the value of the property now devoted to the electric light and power business, ascertain the contributions

made towards its construction and development in the thirty-five years of joint operation by the electric railway patrons, and give that branch a proportionate share of the income attributed to that property. For certainly the electric railway is a "related business" to the electric light and power business, and as was held in the *United Fuel Gas Company case* "This joint use requires a prorating of joint investment and expenses and of the return from the joint investment." (In this connection we may say it is common knowledge that up till recent years the electric railway was the major department of such an electric street railway, light and power business.) We think it apparent from the record that an excessive proportion of the income has been of late years attributed to the so-called electric department to the prejudice of the railway department, and that if proper credit were given the so-called railway department would not show any loss.

But, however that may be, we submit confidently that the company cannot be allowed to abandon the railway service even if it concededly could only be operated at a loss. The question of loss on this service is immaterial as long as the company retains the benefits of the charter. We say this because as was said in the *Atlantic Coast Line* and *Missouri Pacific cases*, this is "the primal duty" of this company, "coterminous with the powers of the corporation" (206 U. S., 1), "which it was incumbent upon it to perform as the necessary result of the possession and enjoyment of its charter powers, and which it could not refuse to perform as long as the charter powers remained" (216 U. S., 262).

It is moreover, we believe, the generally accepted doctrine in the State Courts, as well as the Federal Courts, as indicated in the cases already cited, that a public utility company can give up its franchise only by consent of the State, unless it is (1) insolvent, and (2) incapable of being operated except at a continuing loss.

22 R. C. L., p. 750; *State v. Dodge City M. & T. Ry. Co.*, 53 Kan., 377, 36 Pac., 747, 42 Am. St. Rep., 295; *Gates v. Boston & N. Y. A. L. R. R. Co.*, 53 Conn., 333, 5 Atl., 695; *Peo. v. Colo. Title & Trust Co.* (Colo.) 178 Pac., 6; *Sou.*

Ry. Co. v. Hatchett, 174 Ky., 463, 192 S. W., 695; L. R. A., 1917-D, 1105; *State ex rel. Bridgeton v. Bridgeton & M. Trac. Co.*, 62 N. J. L., 592, 45 L. R. A., 837; *State ex rel. Grinsfelder v. Spokane St. Ry. Co.*, 19 Wash., 518, 41 L. R. A., 515; *Potwin Place v. Topeka R. Co.*, 51 Kan. 609, 37 Am. St., 312; *Paige v. Schenectady R. Co.*, 178 N. Y., 102; *Thompson v. Schenectady R. Co.*, 65 C. C. A., 325, 131 Fed., 577; *In Re. Loader*, 14 Misc., 208, 35 N. Y., Supp., 996 (pointing out necessity of company coming to terms with labor).

In the above cited *Southern Ry. Co. v. Hatchett* case the Court pointed out that all the principal cases where abandonment has been actually allowed, particularly *Jack v. Williams*, 113 F., 823 (145 F., 281), turned upon the insolvency and worthlessness of the company as a whole. This also applies to the *Texas case*.

It was evidently in recognition of this doctrine that the companies here tried to separate the franchise and destroy the Columbia Railway, Gas & Electric Company, and have now as a last resort undertaken to argue that the franchise was never consolidated.

No Valid Separation Under the Merger Act.

There has been no valid separation under the so-called Merger Act.

(It is interesting to note that petitioners while calling the Act in their answer the "Merger Act" have now begun referring to it as the "Enabling Act.")

We respectfully invite the Court's attention to the concurrent findings of the referee and of the Supreme Court on this question, which state the facts fully.

The Merger Act was no part of the Canal Settlement. The Act creating the Canal Commission conferred no power whatsoever to deal with any attempted separation of the company's franchise (see S. C. Acts 1923, p. 828, Acts of 1924, p. 1839). Mr. Barnett, Secretary of the Canal Commission, testified that the commission expressly declined to embody any reference to the Merger Act in the Canal Settlement Bill (see R. 782-787), the Bill being thereafter duly passed by the

Legislature and containing no reference to the Merger Act or any alleged separation (see Acts of 1925, pp. 852-859).

Moreover the Merger Act itself did not purport to authorize any alleged separation, but on the contrary expressly provided that any such merger or sale as authorized should be "made without prejudice . . . to any rights of any creditors . . . ," and also that the transferee of the franchises should hold them "subject . . . to the restrictions, requirements and conditions in the said franchises contained" (R. 807). The Act was plainly intended to authorize the transfer or merger of the properties and franchise without in any wise releasing the companies from any of their obligations. It was so found by the South Carolina Supreme Court. No doubt it was the intention of petitioners to utilize such act as a justification for the attempted separation and abandonment of the electric railway service, **but such purpose does not appear in the language of the Act.**

But if there was any ambiguity in the Act itself, such ambiguity should be resolved in favor of the public and against the company.

"It may be," as was said by Mr. Justice Day in the case of *Blair v. Chicago*, 201 U. S., 400, 50 L. Ed., 801, "that the very ambiguity of the Act was the means of securing its passage. Legislative grants of this character should be in such unequivocal form of expression that the Legislative mind may be distinctly impressed with their character and import, in order that the privileges may be intelligently granted or purposely withheld. It is a matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the Legislature with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give. This is one among many reasons why they are to be strictly construed. . . .

This principle has been declared axiomatic as a doctrine of this Court. *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S., 659, 666, 24 L. Ed., 1036, 1038. In *Slidell v. Grandjean*, 111 U. S., 412, 438, 28 L. Ed., 321, 330; 4 Sup. Ct. Rep., 475, it is declared a wise doctrine: "It serves to defeat any purpose concealed by the skillful use of the terms to

accomplish something not apparent on the face of the Act, and thus sanctions only open dealing with legislatives bodies . . . " (p. 831).

Moreover under the facts in this case, as shown by the record, and as found by the South Carolina Supreme Court, there has clearly been no valid separation, but on the contrary a merger of these two companies.

The president of the Broad River Power Company in the advertisements relative to the sale of bonds referred to the Broad River Power Company as controlling and operating the electric railway property and service (see Ex. 27) and having acquired "through merger" the properties of Columbia Railway, Gas & Electric Company (see Ex. 15 McF), and petitioners' counsel also referred to the transaction as a merger (see Ex. 2 R., p. 808).

Also the facts that the Broad River Power Company owned all the common stock, and practically all the preferred stock, had the same officers and offices and took practically all the assets from the one company and put them in the name of the other, without any consideration, leaving the old company in a helpless condition (Ex. A-26) and then undertook to advance certain operating funds to the old company, without security or due date, and thereafter undertook to put the Columbia Railway, Gas & Electric Company into bankruptcy so as to put a stop to this proceeding—all these facts show that the Columbia Railway, Gas & Electric Company has been treated as a mere instrumentality or agency or department of the Broad River Power Company.

Under these circumstances we think there has clearly been a merger of the two companies in accordance with the frequently expressed opinions of this Court and of the South Carolina Supreme Court.

Davis v. Alexander (U. S.), 70 L. Ed., 186.

Chicago M. & St. P. R. Co. v. Minneapolis C. & C. Association, 247 U. S., 490, 62 L. Ed., 1229.

United States v. Lehigh Valley R. Co., 220 U. S., 357, 55 L. Ed., 458, 463, 31 Sup. Ct. Rep., 387.

United States v. Delaware L. & W. R. Co., 238 U. S., 516, 59 L. Ed., 1438, 35 Sup. Ct. Rep., 873.
Brabham v. So. Express Co., 124 S. C., 157.
Brown v. Am. Ry. Express Co., 128 S. C., 428.
Huggins v. Com. Sav. Bank, 140 S. E., 177.
Terry v. Sou. Exp. Co., 141 S. E., 144.

In the case of *Chicago M. & St. P. R. Co. v. Minneapolis C. & C. Association*, 247 U. S., 490, 62 L. Ed., 1229, the Court applied the above principle and held that two holding corporations, which owned all the stock in a subsidiary company operating in the City of Chicago, must be held to directly own the property which was in the name of the company so controlled. In other words, the Court completely disregarded the corporate fiction. The Court in that case, after pointing out that the mere ownership of capital stock alone did not of itself create an identity of corporate interest between two companies, or create the relation of principal and agent or representative between the two, continued: "While the statements of the law thus relied upon are satisfactory in the connection in which they were used, they have been plainly and repeatedly held not applicable where stock ownership has been restorted to, not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose, as in this case, of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company or companies. *United States v. Lehigh Valley R. Co.*, 220 U. S., 357, 55 L. Ed., 458, 463, 31 Sup. Ct. Rep., 387, and *United States v. Delaware L. & W. R. Co.*, 238 U. S., 516, 59 L. Ed., 1438, 35 Sup. Ct. Rep., 873. In such a case the Courts will not permit themselves to be blinded or deceived by mere forms of law, but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require."

When we take into consideration the principles laid down in the above case in connection with the facts of this case, it must be apparent that the two corporations are merged and the Broad River Power Company is liable for the obliga-

tion to perform the electric railway service. Certainly there has been either an express or implied assumption of the liabilities of the Columbia Railway, Gas & Electric Company (as in the *Brabham case*, 124 S. C., 157, and in the *Huggins case*, 140 S. E., 177), or a taking over of its business (as in the *Terry Packing Company case*, 141 S. E., 144, and the *American Railway Express Company v. Commonwealth of Kentucky case*, 273 U. S., 269, 71 L. Ed., 639, therein cited) or the utilization of the electric railway company as a mere agency or instrumentality of the power company (as in the *Minneapolis case*, 62 L. Ed., 1229). Any one or more of these reasons are sufficient to constitute a legal merger under the authorities cited.

This Court and other Courts have frequently expressed emphatic disapproval of such devices on the part of public service corporations. See *Thomas v. West Jersey R. R. Co.*, 101 U. S., 71, 83 (25: 950, 952); *Gibbs v. Consolidated Gas Co.*, 130 U. S., 396, 32 L. Ed., 985 (saying about a similar device to be relieved of the obligation to furnish gas service: "There is nothing upon which to rest the suggestion that the companies were unable to serve the consumers, **while the record shows, on the other hand, that they simply desired to make larger profits on whatever gas they might furnish. . . .**" *United Fuel Gas Company v. R. R. Commission of Ky.*, 278 U. S., 300, 73 L. Ed., 390, saying:

> "We need not labor the point that a public service corporation may not make a rate confiscatory by reducing its net earnings through the device of a contract unduly favoring a subsidiary or a corporation owned by its own stockholders. *Cf. Chicago & G. T. R. Co. v. Wellman*, 143 U. S., 339, 345, 36 L. Ed., 170, 179, 12 Sup. Ct. Rep., 400."

The chief significance in this attempted separation, it seems to us, consists in the admission therein implied that otherwise the franchise was indivisible—the electric railway and the

electric light and power being one business. **No better proof that the electric railway is tied to the electric light and power franchise can be conceived than this unlawful, fictitious attempt to separate them.**

No such desperate effort would have been made to accomplish a separation—a similar attempt having just been defeated in the company's allied Spartanburg properties by the **Spartanburg** decision—but that the company realized the unity of its franchise.

> "Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence. *Chicago v. Sheldon*, 9 Wall., 50, 54, 19 L. Ed., 594, 596. *Brooklyn L. Ins. Co. v. Dutcher*, 95 U. S., 269, 273, 24 L. Ed., 410, 411. *District of Columbia v. Gallaher*, 124 U. S., 505, 510, 31 L. Ed., 526, 527, 8 Sup. Ct. Rep., 585 . . ."
>
> *Old Colony Trust Co. v. Omaha*, 230 U. S., 100, 57 L. Ed., 1410, at 1417.

II

THE OBLIGATION CREATED BY THE COLUMBIA ORDINANCES

We submit that the acceptance of the Columbia Ordinances also created a supplemental franchise contract to operate, regardless of loss.

The situation was in substance that the company having received directly from the State by its charter the primary franchise to operate in the City of Columbia, for a period of fifty (50) years, provided it could obtain the consent of Columbia City Council, thereupon applied to Council for such consent. This consent was given by ordinances granting the right to the company to operate, provided it should operate daily and regularly and as directed by City Council. The acceptance and operation, under these ordinances, we submit, clearly constitute a contract on the part of the company to operate at least for the fifty (50) year period of the company's charter.

The requirement that the company obtain the consent of City Council recognized the right of Council to contract as to the terms upon which such consent should be given. (See *Columbus R. P. & Light Co. v. Columbus*, 249 U. S., 399; 63 L. Ed., 669; *St. Cloud Public Service Co. v. City of St. Cloud*, 265 U. S., ; 68 L. Ed., 1050; *Quinby v. Public Service Commission*, 3 A. L. R., 685; 223 N. Y., 244; *City of Portsmouth v. Va. Ry. & Power Co.*, 141 Va., 54, 39 A. L. R., 1510, in which the Court said:

> "This power to give such consent necessarily implies the right to refuse it, and this in turn implies a power to attach appropriate conditions thereto. . . ." (p. 1512.)

Lenawee County Gas & E. Co. v. City of Adrian, Mich., ; 176 N. W., 590; 10 A. L. R., 1328.

Interurban Ry. & Terminal Co. v. Public Utility Com., 98 Ohio St., 287; 3 A. L. R., 696.

Indeed no contest is made in this case about the right and power of the City of Columbia to make such a contract.

This franchise contract required operation on the part of the company as the consideration for the grant.

New York Elec. Co. v. Empire City Subway Co., 235 U. S., 179; 59 L. Ed., 184.

Owensboro v. Cumberland Tel. & Tel. Co., 230 U. S., 58; 57 L. Ed., 1389, saying:

"Grants like the one under consideration are not nude pacts, but rest upon obligations expressly or impliedly assumed to carry on the undertakings to which they relate" (p. 192).

"The original ordinance," as was said by the Court in *City R. Co. v. Citizens St. Ry. Co.*, 166 U. S., 557; 41 L. Ed., 1114 (quoted in *Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S., ; 46 L. Ed., 592), "was plainly a proposition on the part of the city to grant to the company the use of its streets . . . in consideration that the company lay its tracks and operate a railway thereon upon certain conditions prescribed by the ordinance. This proposition when accepted by the company and the road built and operated as specified, became a contract . . ." (p. 607.)

See also to the same effect *Columbus R. P. & Light Co. v. Columbus*, 249 U. S., 399; 63 L. Ed., 669.

Moreover these ordinances expressly required the company to operate the service daily and thereafter to comply with all the regulations of Council (R., 840). City Council has enacted an amendatory ordinance requiring and directing operation (See Exhibit 35). This, Council, we submit, clearly had the right to do. (*Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S., ; 46 L. Ed., 607; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S., 285; 43 L. Ed., 702; *Milwaukee Elec. Ry. & L. Co. v. State of Wisconsin*, 252 U. S., 100; 64 L. Ed., 476; *Sumter Gas & Power Co. v. Sumter*, 282 Fed., 931; *Charleston Consolidated Railway & Lighting Co. v. City Council of Charleston*, 92 S. C., 127).

In the above-cited *Charleston case* (92 S. C., 127), the Supreme Court of South Carolina had held in effect that such ordinance made the City Council the agent of the Company for the purpose of directing the operation, and that the company was bound by contractual obligation to comply with such regulations.

Also, the provision of a "Penalty for Failure to Run" clearly implied an obligation on the part of the company to operate. Certainly no such penalty would have been prescribed unless it was definitely understood that the company was under obligation to operate. The respondents alleged in their answer and contended before the Referee that this was an exclusive penalty, of which advantage might be taken by the companies. We assume that they have now abandoned that position as no exception to the Referee's adverse finding thereon was taken. The authorities, however, overwhelmingly show that said penalty was prescribed for the benefit of the City to whom the obligation was due, and may not be taken advantage of by the company by whom the obligation should be performed.

Pomeroy Eq. Jur., Sec. 446.
First Trust & Savings Bank v. Pruitt, 121 S. C., 484.
Jolly v. Martin, 120 S. C., 317.
Union Pac. R. Co. v. Chicago, R. I. & P. R. Co., 163 U. S., 564; 41 L. Ed., 265.
25 R. C. L., 205.
36 Cyc., 570.

This franchise contract was effectually accepted by the operation of the company thereunder. No further formal acceptance was necessary.

"No formal resolution of acceptance is necessary in any case," said this Court in the *City R. Co. v. Citizens St. Ry. Co.*, 166 U. S., 558; 41 L. Ed., 1114, "if the facts show an actual, practical acceptance by the company, or action which would be only explicable in case the amendment were accepted" (p. 1118). In that case this Court further said with

regard to the effect of the company's application for the passage of an ordinance:

> "This was sufficient, as it is universally held that a previous request for an ordinance obviates the necessity of a subsequent acceptance. *Atlanta v. Gate City Gaslight Co.*, 71 Ga., 106; *Illinois River R. Co. v. Zimmer*, 20 Ill., 654; *Lincoln & K. Bank v. Richardson*, 1 Me., 79 (10 Am. Dec., 34); *State, Carlton v. Dawson*, 22 Ind., 272; *Newton v. Carbery*, 5 Cranch, C. C., 632; *Perkins v. Sanders*, 56 Miss., 732, 739; 1 *Morawetz*, Priv. Corp., S. 23."

This franchise contract was necessarily binding on both parties at least for the 50 year term of the State charter franchise.

The State charter had expressly given the primary franchise to operate in the City of Columbia for a period of fifty years "with consent of City Council." This consent must, therefore, necessarily have been applied for and granted for the said 50 year term.

This principle was applied in the case of *Minneapolis v. Minneapolis Street Ry. Co.*, 215 U. S., 417, 54 L. Ed., 259, in which the Court held that the City "was bound to take notice of the company's charter," and adopted the following quotation from *Duluth v. Duluth Gas & Water Co.*, 45 Minn., 210; 47 N. W., 781:

> "The council must be held, when dealing with defendant, to know its character, its purposes and powers, as disclosed by its articles of incorporation" (p. 268).

It is also generally held that a franchise of this sort granted to such a corporation, and without words authorizing transfer, would be binding at least for the charter life of the corporation. (*St. Clair County Turnpike Co. v. Illinois*, 96 U. S., 63; 24 L. Ed., 657; 26 C. J., 1041; *Mercantile Trust Co. v. Denver, et al.*, 161 Fed., 769; *Blair v. Chicago*, 201 U. S., 400; 50 L. Ed., 800 at 831-835.)

See also *Whalen v. Baltimore and Ohio Ry. Co.*, 112 Md., 197; 12 R. C. L., 193; *White v. Hart*, 13 Wall., 653; *Van*

Hoffman v. City of Quincy, 4 Id., 535; *Edwards v. Kearzey*, 96 U. S., 601; *McCandliss v. R. R. Co.*, 38 S. C., 103 at 113.

For the purposes of this case there was no need for this franchise contract between the city and the company to contain any provisions as to rates. This case does not involve the matter of rates at all. The State charter had provided that the company should have the right to operate "at such rates as may be fixed upon in the by-laws of the same," and this provision, of course, left the right to regulate the rates in the State of South Carolina.

The contract, however, had provided for the maintenance of a schedule of operation and for compliance with the regulations and ordinances of City Council. This is the issue which is involved in this case from the standpoint of such contract.

Certainly no schedule of rates is necessary to the existence of the contract to operate. (*Fort Smith L. & T. Co. v. Bourland*, 69 L. Ed., 631; *Milwaukee case*, 64 L. Ed., 476; *Detroit case*, 46 L. Ed., 592; *City R. Co. v. Citizens St. Ry. Co.*, 41 L. Ed., 1114; *Charleston Consolidated Ry. & L. Co. v. Charleston*, 92 S. C., 127.)

City Ordinances Granting Electric Street Railway Franchise Constitute Contract.

It is uniformly held that city ordinances granting the right to a street railway company to use the city streets, constitute a franchise contract (*N. Y. Elec. Lines Co. v. Empire City Subway Co.*, 253 U. S. 179; 59 L. Ed., 184. *Cleveland v. Cleveland Electric Co.*, 201 U. S., 529; 50 L. Ed., 854. *Cleveland v. Cleveland City R. Co.*, 194 U. S., 517; 48 L. Ed., 1102. *Southern Wis. Ry. Co. v. Madison*, 59 L. Ed., 739. *Minneapolis v. Minneapolis St. Ry. Co.*, 215 U. S., 417; 54 L. Ed., 259. *Detroit v. Detroit Citizens' St. R. Co.*, 184 U. S., 368; 46 L. Ed., 592. *City R. Co. v. Citizens St. R. R. Co.*, 166 U. S., 558; 41 L. Ed., 1114), requiring operation regardless of loss. (*Henderson Water Company v. Corporation Commission of North Carolina et al.*, 278 S. C. R., 282; 70 L. Ed., 273. *Fort Smith & T. Co. v. Bourland*, 267 U. S., 330; 69 L. Ed., 631. *St. Cloud Public Serv-*

ice Co. v. City of St. Cloud, 265 U. S. . . . .; 68 L. Ed., 1050. *Paducah v. Paducah Railway Co.,* 261 U. S., 267; 43 Sup. Ct. Rep., 335; 67 L. Ed., 647. *Georgia Railway & Power Co. v. Town of Decatur,* 262 U. S., 431; 67 L. Ed., 1065. *Southern Iowa Electric Co. v. Chariton,* 255 U. S., 539; 65 L. Ed., 754. *Milwaukee Elec. Ry. & L. Co. v. State of Wisconsin, etc.,* 252 U. S., 100; 64 L. Ed., 476. *Columbus R. P. & Light Co. v. Columbus,* 249 U. S., 399; 63 L. Ed., 669. *Michigan Ry. Co. v. Lansing,* 260 Fed., 322. *Spartanburg v. Spartanburg Gas & Elec. Co.,* 130 S. C., 125. *Charleston Consolidated Ry. & Lighting Co. v. City Council of Charleston,* 92 S. C., 127. *Sumter Gas & Power Co. v. Sumter,* 283 Fed., 931 [4th Circ., 1922], 10 A. L. R. [note], 897.)

The above-cited *Columbus R. P. & Light Co. v. Columbus case* (249 U. S., 399; 63 L. Ed., 669), is in principle, we submit, on all fours with the case at bar. In that case the company had applied for and accepted a 25 year ordinance granting the right to operate (also prescribing rates). Following the war the company claimed that it could not operate except at a heavy loss amounting to somewhat over $250,000 annually. The company sought to abandon the entire operations covered by the ordinances in question, which it tried to surrender **in toto.**

This Court, however, required the company to continue operation, dismissing the company's contention that the ordinance merely granted a permissive right to use the streets.

> "We can have no doubt," said this Court, "that under the authority of the laws referred to, and in view of the terms of the ordinances in question, and the acceptances by the grantees, the City of Columbus made valid and binding contracts with the companies, binding for the term of twenty-five years. By these contracts, obligatory alike upon the city and the company, the city granted the right to use the streets and the company bound itself to furnish the contemplated service at the rates of fare fixed in the ordinances. **We cannot agree with the contention of the appellant that these were permissive franchises, granted and accepted with the right upon the part of the company to abandon the uses and**

purposes for which the franchises were granted because the rates fixed became unremunerative, as alleged in the amended bill. The authority under which the city acted came from the State, and was granted by proper statutes passed for that purpose. **The contracts were made between the city and the company, and became mutually binding for the period named in the ordinances."**

. . . . . .

"We come, then, to consider whether the amended bill shows the happening of an event or events which have released the company from the obligations of the contract, and authorized it to cancel the same upon the surrender of its franchise. Justification for that course is said to exist in the conditions following the World War (411) and resulting therefrom, particularly, in the great increase in wages by the arbitral award of the War Labor Board, which was due to the necessity of meeting the high cost of living as a direct result of war conditions. This, it is contended, presents a situation that made the subsequent keeping of the contract practically impossible except at a ruinous loss to the company."

The Court then emphatically dismissed the contention that such alleged loss would constitute any defense, basing its decision upon "the principle, frequently declared in decisions of this Court, that if a party charge himself with an obligation possible to be performed, he must abide by it unless performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties will not excuse performance. Where the parties have made no provision for a dispensation, the terms of the contract must prevail." *United States v. Gleason*, 175 U. S., 588, 602; 44 L. Ed., 284, 289; 20 Sup. Ct. Rep., 228, and authorities cited. *Carnegie Steel Co. v. United States*, 240 U. S., 156, 164, 165; 60 L. Ed., 576, 578, 579; 36 Sup. Ct. Rep., 342. The latest utterance of this Court upon the subject is found in *Day v. United States*, 245 U. S., 159; 62 L. Ed., 219; 38 Sup. Ct. Rep., 57, in which it was said:

> "One who makes a contract can never be absolutely certain that he will be able to perform it when the time comes, and the very essence of it is that he takes the risk within the limits of his undertaking. But when the scope of the undertaking is fixed, that is merely another way of saying that the contractor takes the risk of the obstacles to that extent."

We earnestly invite the Court's attention to that case, and submit that it is conclusive in the case at bar. In that case there was no provision in the ordinance expressly providing that the company should continue to operate for the full period of the grant. The company was, however, as was commented upon by the Court, "required to run cars upon certain streets not in excess of certain intervals." This provisions was similar to the ordinances in the case at bar. The duty to operate was enforced by this Court as a necessary consequence of the right to operate under the ordinances.

The principle of the foregoing *Columbus case* has been uniformly recognized and applied by this Court in many subsequent cases.

In the *Decatur case, supra* (262 U. S., 431; 67 L. Ed., 1065), the company contended that the enforcement of the franchise contract would necessitate operation at a loss and confiscate his property. The Court, however, said that it would "lean to an agreement with the state court," as to the construction of the ordinances involved (citing 50 L. Ed., 170; 45 L. Ed., 679; 46 L. Ed., 592), and "considering the question in this light, we see no reason to differ with that court in its view of the validity and binding quality of the contract. The contract being valid, we are not concerned with the question whether the stipulated rates are confiscatory. *Southern Iowa Electric Co. v. Chariton*, 255 U. S., 539, 542; 65 L. Ed., 764, 776; 41 Sup. Ct. Rep., 400. *Paducah v. Paducah R. Co.*, decided February 19, 1923 (261 U. S., 267, *ante*, 647; 43 Sup. Ct. Rep., 335)." (67 L. Ed., 1074.)

In the *St. Cloud case, supra* (68 L. Ed., 1050), this Court said that the enforcement of such franchise contract rates "is controlled by the obligation resulting from the contract, and the

question whether they are confiscatory is immaterial. *Southern Iowa Electric Co. v. Chariton*, 255 U. S., 539, 542; 65 L. Ed., 764, 775; 41 Sup. Ct. Rep., 400, and cases there cited. *Paducah v. Paducah R. Co.*, 261 U. S., 267, 273; 67 L. Ed., 647, 651; 43 Sup. Ct. Rep., 335. *Georgia R. & Power Co. v. Decatur*, 262 U. S., 434, 438; 67 L. Ed., 1065, 1073; 43 Sup. Ct. Rep., 613." . . . (Page 1054.)

The principle was also applied in the *Milwaukee case, supra*, (64 L. Ed., 476), in which the company was required to repave under the municipal franchise contract regardless of alleged loss; and in the *Fort Smith case* (69 L. Ed., 631), already discussed, in which the company was required to rebuild and regrade a line; and also in the subsequent case of *Henderson Water Co. v. Corporation Commission of North Carolina* (70 L. Ed., 273), as to a water franchise; and in the *Sumter case* (288 Fed., 931), as to a gas franchise.

Most of the above cases dealt with rates, but the principle, we submit is the same, whether the provision of the contract in question involved rates or merely involved operation as in the case at bar. Many of the cases in which such contracts have been held not binding have turned upon the absence of the municipality to make binding contracts for rates.

> See *R. R. Commission of California v. Los Angeles, Ry. Corp.*, ... U. S., ... ; 74 L. Ed., 113 (No. 4 Adv. Opinions).

This case, however, merely involves operation and this franchise contract in the case at bar clearly provided for such operation. Hence, alleged losses as a defense to the obligation to operate constitutes no defense.

See also to the same effect the following among many other cases (many of which are cited in 6 A. L. R., 1659 and 10 A. L. R., 897):

> *Berg v. Erickson* (1916), L. R. A., 1917-A, 648; 148 C. C. A., 415; 234 Fed., 817.
>
> *Ottumwa R. & Light Co. v. Ottumwa* (1919), ... Iowa . . . ; 173 N. W., 270 (street railways).
>
> *Moorhead v. Union Light, Heat & P. Co.* (1918), 255 Fed., 920 (gas company).

Michigan R. Co. v. Lansing (1919), 260 Fed., 322.
Bismarck Gas Co. v. District Court (1919, ... N. D., ...; P. U. R., 1919-C, 394; 170 N. W., 878.
Interurban R. & Terminal Co. v. Cincinnati (1915), 93 Ohio St., 108; 112 N. E., 186.
Muscatine Lighting Co. v. Muscatine (1919), 256 Fed., 929.

Many of the principles discussed in the foregoing portion of this argument, dealing with the charter obligation to operate, are equally applicable to this portion of the argument dealing with the City franchise obligation. The principles involved are in many respects identical, and the charter from the State created the primary contract of the company. The franchise from the City constituted a supplemental or secondary franchise. The two franchises are to be construed together, and are complementary with respect to each other and are interdependent.

This is particularly true in the case at bar since the State of South Carolina owns the fee to the streets in the original City of Columbia (*South Bound Railway Co. v. Burton*, 67 S. E., 515; 46 S. E., 340), but has delegated the City of Columbia the power to regulate and control the streets (see S. C. Acts 1871), and also Columbia is the State's capital city.

Franchises from municipalities are, however, somewhat more definite and specific, and perhaps more valuable, than many of the general permissive charters obtained under the general state laws. They create a very intimate and vital relationship between such municipalities and the companies to whom they are granted. The Circuit Court of Appeals in dismissing the company's attempt at bankruptcy (27 F. [2nd] 52) commented forcibly upon this fact. For this reason such franchise contracts, as was said in many of the foregoing cases, relate to the city's proprietary character, and are enforcible according to the common law of contracts. (See the *Columbus case*, the *St. Cloud case*, and many of the foregoing cases.)

The poles and wires erected under these franchise ordinances throughout the City of Columbia are now being used by the Broad River Power Company in connection with its electric light and power business.

We believe no case can be found where a company which has obtained the right to operate an electric street railway system under such ordinances has been allowed to abandon the service.

The *Texas case, supra* (68 L. Ed., 561), which seems to be relied upon, involved merely the abandonment of a purely permissive charter taken out by a railroad company under a general state law, is obviously inapplicable. The case of *Potter-Matlock Trust Co. v. Warren County, Ky.*, 207 S. W., 709 (1919), relied upon by appellant, was expressly limited "to a state of facts similar to that presented by the record" (which were quite different from those here), and was held not to apply "where there was a contract obligation on the part of the company to operate its railway for a specified time," and is otherwise apparently in conflict with the decisions of this Court and other Courts and of the State of South Carolina. (See *Spartanburg case*, 130 S. C., 125).

Finally, in many of the cases already cited, and in many others where the City has tried to terminate the grant, such ordinances have been held to create the absolute right to operate (57 L. Ed., 1389; 59 L. Ed., 184; 50 L. Ed., 854; 59 L. Ed., 739; 54 L. Ed., 259; 46 L. Ed., 592; 41 L. Ed., 1114; 10 A. L. R., 897; Cook, Corp. p. 3700, S., 913; 161 Fed., 769); these decisions being based upon the ground that the consideration for the grant was the duty of the company to operate. Fairness of construction and the mutuality of contracts, we submit, require that in the case at bar the company be held bound by the duty to operate.

"The impairment of contract and the due process of law clauses of the Constitution," as was said by the District Court in the *Columbus case* (253 Fed., 504–5) afterwards affirmed by the Supreme Court, "have often been invoked to prevent cities from impairing franchise grants, or forcing a reduction in the contract rate, and the courts have uniformly, despite all criticism, sustained and upheld them, and, in so doing, have vindicated the law. It is equally the duty of the courts to uphold these contracts and vindicate the law when it is the grantee therein, and not the city, which is seeking to change the terms thereof without the consent of the other party. It is of primary importance that contracts should be upheld by the courts, for the right

to contract and the binding obligation of contracts once made lie at the foundation of all public and municipal law."

Columbus Ry. Power & Light Co. v. City of Columbus, 253 Fed., 504–505.

We, therefore, submit that these ordinances, either endorsed alone or as supplementary to the state charter franchise, constitute a contract requiring operation.

III

THE OBLIGATION CREATED BY DEVELOPMENT COMPANY CONTRACTS REQUIRING OPERATION

As hereinbefore stated a considerable portion (approximately one-third) of the electric railway trackage was acquired under contracts expressly requiring continued operation.

The North Columbia Land Company contract required the company to operate and maintain the system from its date, August 12, 1906, **"thenceforth"** (R., 851–854). The Shandon Annex Company contract required maintenance and operation in effect "in perpetuity" (R., 855–862). The Columbia Land and Investment Company 99-year lease of October 23, 1902 (R., 864–869) provided for continuous operation "during said period." (The subsequent acquisition of this last line by the company did not in anywise purport to affect or extinguish this obligation to operate [R., 1066] but was merely in pursuance and in consideration of the terms of the foregoing lease.)

The North Columbia Land Company is one of the parties to this suit.

The Supreme Court of South Carolina held, rightly as we submit, that these contracts were valid and subsisting and required the operation of the system regardless of alleged loss (R., 239–241). This finding of the State Supreme Court presents no question which this Court will review.

Arkansas So. R. R. Co. v. German Natl. Bank, 207 U. S., 270, 52 L. Ed., 201. *Consolidated Turnpike Co. v. Norfolk, etc., R. Co.*, 228 U. S., 596, 57 L. Ed., 982. *Municipal Securities Corp. v. Kansas City*, 246 U. S., 63, 62 L. Ed., 579. *Bilby v. Stewart*, 246 U. S., 255, 62 L. Ed., 701. *Am. Ry. Express Co. v. Kentucky*, 273 U. S., 269, 71 L. Ed., 639.

In *American Railway Express Company v. Kentucky*, the Court, speaking through Mr. Justice McReynolds, said:

> "Save in exceptional circumstances not now present we must accept as controlling the decision of the State Courts upon questions of local law, both statutory and common.

'The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this Court to revise the decisions of the State Courts upon questions of State Law.'"

However that may be we submit the finding is fully supported by the authorities.

The chief contention of appellants in this regard, as we understand, is that these contracts are no longer subsisting but have been fully performed and, impliedly, that their enforcement would work a hardship.

In considering this question regard must be had to the circumstances and purpose of the contracts; and they must be construed as of the time when they were made.

Franklin Telegraph Co. v. Harrison, 36 L. Ed., 776; *Western U. Tel. Co. v. Pen. Co.,* 129 Fed., 849; *Moorehead v. Union Light, Heat & P. Co.* (1918), 225 Fed., 920; *Rutland Marble Co. v. Ripley* (1870), 10 Wall. (U. S.), 339; 19 L. Ed., 955; 3 Mor. Min. Rep., 291; *Ottumwa R. & Light Co. v. Ottumwa* (1919), Iowa, 173 N. W., 270; *Interurban R. & Term. Co. v. Cincinnati* (1915), 93 Ohio St., 108; 112 N. E., 186.

The contracts were made by the company for the purpose of extending its system and acquiring patronage, and by the development companies to furnish a means of transportation for the communities which they were developing (R., p. 300–382). These companies and communities have contributed substantially, in cash and in patronage as a consideration for such contracts. Clearly, their purpose has not yet been fulfilled (R., 300–382).

Such contracts, we submit, under all the authorities, including the authorities cited by respondents, cannot be held to have terminated or to have been performed so as to give the company the right to quit in March, 1927.

We will quote only a few of the pertinent authorities as the matter seems to us to be clear.

In *Franklin Telegraph Co. v. Harrison,* 145 U. S.——; 36 L. Ed., 776, this Court held in effect that such contracts in

the absence of a provision expressly fixing their duration contain a continuing obligation.

The facts were that the appellant Telegraph Company had agreed with the defendants in 1867, in consideration of the defendants erecting at their own expense a telegraph line between New York and Philadelphia for the joint use of both plaintiffs and defendants, "to keep and maintain at their own expense the said wire in good working order," and after ten years from date to allow the defendant the use of the wire for the sum of $600.00 per annum. No term for the duration of this right was expressed in the contract itself. In 1882 the Telegraph Company claimed that the contract had been fully performed and terminated and threatened to deprive the defendants Harrison of their rights to use the wire as provided under the terms of the contract. This action was brought to enjoin the threatened action of the Telegraph Company. The injunction was granted in a strong, clear opinion, to which we invite this Court's attention.

In the case of *McKell v. C. & O. Rwy.*, 175 Fed., 321, it was held by the Circuit Court of Appeals of the Sixth Circuit that (quoting syllabus):

> "A contract between the owner of a tract of coal land and a railroad company, by which the landowner agreed to develop mines on his land to a stated capacity, and the company agreed to build a branch line to the mines and to purchase the coal, produced at the ruling price of a certain other coal, which contained no provision as to its duration, was not terminable at the will of one party, but was permanent so long as the stipulated production was maintained, unless sooner terminated by consent of both parties."

"That question is," said the Court, speaking through Mr. Justice Lurton: "What was the intended duration of the contract? **No limitation is expressed in the agreement. And in such case the rule seems to be that neither party can terminate it without the consent of the other, unless the nature of the contract itself in-**

dicates with sufficient clearness that the parties must have intended some other determinaion. Turning again to the stipulations of the contract, we see how impossible it is to believe that the parties intended that it should be terminable at any time, when either party should be so minded. On the contrary, it seems perfectly clear that they intended it should have a permanent duration. Its objects could not otherwise be fulfilled. . . ."

In *Western Union Telegraph Company* (C. C. A.), 129 Fed., 849, the Court enjoined the defendant railroad company from breaking its contract made in 1856, providing that "after the telegraph line is completed . . . same is to be kept in repair by the railroad company and maintained in first rate working order."

In this case the Court said:

"If a contract is not revocable at the will of either party, or otherwise limited as to its duration, by its express terms, or by the inherent nature of the contract itself, with reference to its subject-matter or its parties, it is presumably intended to be permanent and perpetual in the obligation it imposes. . . . Apart from those contracts, which, from their inherent nature, imply a power of revocation, it would seem that the intention of parties to an agreement, that it should be perpetual and without limit as to duration could not be more properly expressed than by silence as to any time limit, or power of revocation. Reason and authority would seem to concur in support of this doctrine, and we find no direct and controlling authority to controvert it. . . ."

These cases are indeed much stronger than is necessary for the case at bar. In them the intention that the contracts should run in perpetuity was inferred from the absence of any duration fixed in the contract. In the case at bar, however, the language used clearly shows an intention that the contracts should endure in perpetuity. The Shandon contract was for the ex-

press term of 99 years. The words "in perpetuity" used in the Shandon Annex contract in close context with the word "maintain," clearly shows that the "in perpetuity" emphasizes and limits the word "maintain" as applied to the obligation of the Electric Railway Company. In the North Columbia Land Company contract the obligation of the company to "maintain" service is directly limited by the word "thenceforth," meaning "from that time forward." No better words can be found in the English language to express the idea of unlimitedness in time.

The petitioners cited many cases before the Referee and the state Court in the effort to show that the above contract has been terminated or performed:

(87 S. C., 566; 136 U. S., 393; 244 Fed., 650; 108 Wash., 348; 270 S. W., 58; 130 Fed., 438; 59 Ark., 66; 89 Ind., 375; 110 Md., 510; 2 Tenn., C. C. A., 644; 7 Ont. App. Rep., 128; 16 Ont. App. Rep., 52; 112 Md., 187; 65 Fed., 736.)

We do not deem it necessary to discuss these cases in detail. They do not seem to us to conflict with the rule recognized and applied in the foregoing cases. (36 L. Ed., 776; 175 F., 321; 129 F., 849.) Most of them appear to deal with the establishment of stations or sidings. None of them were contracts for the maintenance of electric street railway service with land development companies, and in none of them were the words "thenceforth" or any other language which implied in perpetuity.

The *Childs case*, 87 S. C., 566, was apparently cited in support of the contention that the contract should be terminable upon giving notice of the intention so to do. The very idea, we submit, is, as was said in *Schiller Piano*, 11 A. L. R., 454, "jars unpleasantly on one's sense of justice" and "would offend against good morals and common honesty."

The *Texas & Pacific v. City of Marshall case*, 136 U. S., 393, appears to have turned upon the construction which the Court gave to the words "permanently established." The Court simply held that this expression was fulfilled by actually establishing the shops with no intention at the time of removing or abandoning them. The Court also pointed out and

stressed the fact (p. 389), that the word "permanent" was not used but was omitted from the other parts of the contract relating to the construction and maintenance of the shops. Also that case appears to have been in effect overruled (without being mentioned) by the comparatively recent case of *Inter. & Gt. Northern R. Co. v. Anderson County, et al.*, 246 U. S., ——, 62 L. Ed., 807, in which it was held that the contracts of the railroad company "in consideration of the issue of bonds by the County to maintain its general offices . . . at that place" were binding in perpetuity.

In reply to the implied suggestion of the companies (and of the Referee), that the sole remedy with regard to these contracts would be an action for damages for the breach, we need only quote the language of this Court in the case of *Union Pac. R. v. C. R. I. & P.*, 163 U. S., 564, 41 L. Ed., 265:

> "The jurisdiction of Courts of Equity to decree the specific performance of agreements is of a very ancient date, and rests on the ground of the inadequacy and incompleteness of the remedy at law. Its exercise prevents the intolerable travesty of justice involved in permitting parties to refuse performance of their contracts at pleasure by electing to pay damages for the breach."

See, also, to the same effect *Texas v. Central Oil Co.* (C. C. A., 8th), 194 Fed., 1, 25 R. C. L.. 205, 36 Cyc., 570.

The contracts being valid and subsisting, it goes without saying that alleged losses constitute no defense to the obligation imposed by them.

In any event these contracts, and the circumstances under which they were made (R., 300-383), strongly reinforce the charter franchise obligation to operate.

Gates v. Boston & N. Y. R. Co., 53 Conn., 323, 5 Ill., 695.

IV

THE ALLEGED NECESSITY FOR OPERATING AT A LOSS

The record shows, and the Supreme Court of South Carolina, as well as the Railroad Commission, so found, that the electric street railway service need not be operated at a loss but could be made to yield fair returns if honestly operated.

We submit that this finding should be sustained by this Court.

It is the general rule that findings of fact of this nature by the State Court, where there is evidence in the record to support such finding, will not be reviewed by this Court.

U. S. v. Johnston (N. Y., 1925), 45 S. Ct., 496, 268 U. S., 220, 69 L. Ed., 925, reversing (C. C. A., 1923), 290 F., 120.

Jackson v. State (1926), 280 S. W., 202, 103 Tex. Cr. R., 318, *certiorari* denied (1926), 46 S. Ct., 474, 271 U. S., 661, 70 L. Ed., 1138.

"It is not the province of this Court to weigh conflicting testimony. The record shows testimony supporting the verdict, and this is as far as this Court enters upon a consideration of that question."

Great Northern R. Co. v. Donaldson (Wash., 1918), 246 U. S., 121, 38 S. Ct., 230, 62 L. Ed., 616.

"In cases coming from a State Court we do not review questions of fact, but accept the conclusions of the State tribunals as final."

Christman v. Miller (Cal., 1905), 107 U. S., 313, 25 S. Ct., 468, 49 L. Ed., 770, a chancery case.

Also the companies failed to make any petition for rehearing from such finding of fact on the part of the Railroad Commission as is required by the South Carolina Act regulating

procedure before the commission. The Acts of 1922 provide in effect that within twenty days after the handing down of an order by the Commission any party may apply for a rehearing "in respect to any matters determined in any action or proceeding," and that "no cause of action . . . shall accrue in any Court to any corporation . . . unless such corporations shall have made application to the commission for a rehearing within the time specified" (Acts of 1922, p. 941).

Now the commission having found after due hearing that "the system could be made to yield a fair return" the duty was placed upon the company by this Act to make an application for rehearing on this point; otherwise they are estopped from questioning such findings and the order based thereon, but are bound thereby.

Acts of 1922, pp. 940-942.

Prentis v. Atlantic Coast Line Ry. Co. (1908), 211 U. S., 210, 29 S. Ct., 67, 53 U. S. (L. Ed.), 150.

Pendergast v. N. Y. Tel. Co., 262 U. S., 43, 67 L. Ed., ...

Palermo Water Co. v. Railroad Commission (D. C.), 227 Fed., 708.

Columbia Rwy. Gas. & Elec. Co. v. Sam C. Blease, et al., U. S. D. C. Eastern Dis. S. C. Manuscript Opinion, dated 13 August, 1927.

In the above-cited *Columbia Rwy. Gas & Elec. Co. case,* Judge Cochran, of the Eastern District of South Carolina, based his order, denying the injunctive relief sought, in part upon the ground that the company had failed to make this application for rehearing.

The companies evidently calculated that a further hearing on this question would probably develop all the evidence which was actually developed in the subsequent hearings before the Referee as to their financing the Bus Company and other like conduct. They, therefore, probably chose not to have any further hearing on this question.

In any event we submit that the findings of the Railroad Commission as a body of experts, familiar with conditions in Columbia and vicinity, are entitled to great weight.

C. & N. W. Ry. Co. v. R. R. Com. of Wis., 156 Wis., 47, 145 N. W., 216 (p. 396).

"Commission findings on cases of fact are *prima facie* correct and shall not be set aside unless clearly against the weight of the evidence or without the jurisdiction of the commission."

Chicago Bus Co. v. Chicago Stage Co., 287 Ill., 320, 122 N. E., 477 (p. 401).

"Findings of fact by the commission based upon evidence are not reviewable."

N. & W. Ry. Co. v. Pub. Ser. Com., 82 W. Va., 408, 96 S. E., 62 (p. 404).

Also Railroad Commission v. Railroad Co., 74 S. C., 80.

Moreover we submit that the findings of the South Carolina Supreme Court and of the Railroad Commission are fully sustained by the record.

The real reason for the companies' desire to abandon the electric railway service is, as we have already indicated, that they found the electric light and power phase of the business relatively much more profitable and less troublesome. We have already shown that the operating revenue from this so-called electric department is approximately four times the operating expense. While we submit the railway department can be made to yield a fair return we are prepared to concede that it cannot be made to yield in return four dollars for every dollar spent. The electric light and power business is probably the easiest, surest and most profitable business imaginable outside of tax collecting, to which it is in many respects quite similar.

We do not deem it necessary to discuss in detail in this argument the evidence on this question.

The record shows, however, that after the strike of 1922 the service was neglected (R. 735), and the patronage materially decreased (R. 732). No evidence was offered by the

companies to show any effort to conciliate the striking laborers or remove the evil effects from the strike, or to increase the rates, or otherwise to take any steps to make the service pay, as it should have done. (See *N. Y. ex rel. Woodhaven Gas Light Co. v. Pub. Serv. Com.*, 269 U. S., 244, 70 L. Ed., 255; *Newton v. Consolidated Gas Co.*, 258 U. S., 165, 66 L. Ed., 538). At most the strike was merely a temporary condition and its effects could and should have been removed by proper attitude on the part of the company. (*In re Loader*, 14 Misc., 35 N. Y., Supp., 996).

The undermaintenance of the system was freely admitted by the company and conclusively shown by the evidence. (R. 363–367–372, 439–735). Such undermaintenance can not be justified, for the earnings of the company during this period: $555,557.00 for 1922, $699,920.00 for 1923, $759,515.00 for 1924 (see Ex. 27–31 and 14–16 McF.), were amply sufficient to enable the company to keep its system properly and adequately maintained. It is apparent that the earnings of the service in such undermaintained condition can be no proper index as to the possible earnings of the company.

Also the Broad River Power Company interests determined to eliminate the street railway from the outset (R. 678–679), and thereafter, while appealing to the public for relief on account of alleged bus competition, were negotiating with the White Motor Company to extend credit to the bus company (R. 374-399), and actually contributing at least $19,000.00 in cash to the operating expenses of the supposedly competing Bus Company (R. 776–778). The buses so encouraged took the bulk of the traffic and helped to make the company show a loss (R. 375–377, 734–735). The company also engaged in other deceitful practices towards the same end (R. 356) (Exh. McF. 17, p. 1060).

It was, therefore, a monumental fraud for the companies to claim before the Railroad Commission—that it was impossible to operate the service successfully, because of the competition from the buses, which it was impossible to regulate. The real reason for their bringing the Bus Company into the community, and assisting it in its operations, was to impose upon

and deceive the public and the Railroad Commission on this plea of competition.

The fact that the income attributed to the service decreased from $430,000.00 in 1921, to $100,000.00 in 1926, while the population of Columbia was rapidly increasing, shows conclusively that the company must have deliberately discouraged the available patronage. It is significant that the company offered no local witnesses whatsoever to testify that any effort had ever been made to revive the service after the strike of 1922, or that any earnest effort had been made to make the service pay. It is apparent that the strike of 1922 was seized upon, if not engineered, as an excuse for the abandonment of the relatively less profitable branch of the business.

However the relatively insignificant losses claimed to have been sustained during 1926, coupled with other circumstances, shown by the record, conclusively show, we submit, that the service can be successfully operated.

For the year 1926 the alleged losses amounted to $47,630.35. In this sum is included power amounting to $27,504.60, charged at a rate 36 2/3 per cent higher than the rate charged to the Pacific Mills (R., 624). Also there is a charge for "pole rental" of $2,133.40 (R. 396)—this charge being for the use of poles erected under the electric railway franchise, and which had been taken by the Broad River Power Company without any payment or credit to the so-called railway department (Ex. A., 12–19, R., 1118–1119). Deducting these two book charges leaves net alleged losses for the year 1926 of only $17,992.35.

In calculating the income for the railway department no credit had been given for the approximately $6,000,000.00 net worth of property which had been taken by the Broad River Power Company from the Columbia Railway, Gas & Electric Company without any consideration. Nor was any portion of the net earnings of the company for that year, amounting to somewhat more than a million dollars (Ex. 12 McF.), a large portion of which came from the property which had formerly been used jointly for the electric railway and electric

light and power service, credited to the railway service (Ex. A., 12–19, R., 1118–1119).

The companies' claim that the decreasing losses had been due to reduction in service is completely refuted by the evidence.

For the last six months of 1926, after the greater portion of the system had been discontinued, the alleged total loss of $24,757.17, exceeded the alleged loss for the first six months $22,875.18 when the full system was in operation. It must be noted also that during the latter portion of this period only those lines were being operated, that is, those into North Columbia, and Ridgewood, which the companies' own manager had said were "profitable lines" (Ex. McF., 17, p. 1060).

Moreover, during the entire year of 1926 the jitneys and buses were operating at full speed, while the electric railway service was under-maintained and inadequately equipped and operated. It can be safely estimated that the electric railway service received less than one-fifth of the normal available patronage. Now, however, for the past three years City Council had declined to license any jitneys (R., 521), and the present Bus Company is operating only under license terminable upon restoration of electric street railway service (R., 521–524). City Council has repeatedly assured the company of full protection from competition. (See Resolution of June, 1927, Ex. 33, p. 872, R., 430–444).

Also this Court knows, and the record in this case (R., 441) shows that electric street railway is being operated in practically every city throughout the United States of the size of Columbia, and in even smaller cities.

Besides, the City and the people, as was found by the Court, demand electric street railway service in preference to any other form of transportation. It follows necessarily that the rates can be so adjusted that when proper credits are allowed that the system can be made self-sustaining. Also testimony to the effect that electric street railway service is indispensable to the city was given by Dr. A. C. Moore, Chairman of the Columbia School Board (R., 341–346); by Dr. E. O. Watson (R., 346), who for many years was Chairman of the Board of Trustees of

Columbia College, and now Editor of the Southern Christian Advocate; by Dr. S. C. Byrd, President of Chicora College (R., 321), Mr. C. M. Scott, former Intendant of the Town of Shandon (R., 309), Mr. W. M. Addison, former Councilman of the Town of Eau Claire (R., 353), W. F. Cleveland, Mayor of the Town of Eau Claire, and by F. A. Hoefer, member of Columbia City Council (R., 430). No evidence was or could be given to the contrary.

Under these circumstances we earnestly submit that the only thing necessary for successfully operating the service is for the companies to put the system in proper condition and make an honest effort to make it pay. The Railroad Commission and City Council have shown every disposition to co-operate—only the companies have refused to do their share.

D

SUMMARY AND CONCLUSION

The question involved in this case is whether a public service corporation which, as was found by the South Carolina Supreme Court and by the South Carolina Railroad Commission (a) has accepted and enjoys a consolidated state charter franchise for the operation of electric street railway, light and power service, and (b) which has obtained a city franchise under ordinances expressly providing for daily operation of the service as directed by City Council, and (c) which has entered into contracts with various development companies for the continued operation of the electric railway service, and (d) which has also encouraged competition by undermaintenance and inadequate service and by making cash contributions to a supposedly competing bus company—whether such a company can abandon the electric railway service on account of alleged operating losses on such service alone, while retaining the profitable electric light and power phases of its franchise.

For the reasons hereinbefore stated, and for many others which will no doubt occur to this Court, we submit, the company should not be allowed to abandon the service.

Public service corporations are created for the benefit of the public, and must perform all the services authorized and embraced within their charter purposes as long as they retain any of the benefits of the charter. This is a doctrine which has been repeatedly and uniformly announced and applied by this Court, as well as the Courts all over the country.

Also the City ordinances under which the right to operate the service was obtained in the City of Columbia, and the development company contracts under which the company's system was extended into surrounding communities all expressly provided for continued operation of the system. These contracts must be performed by the company regardless of alleged losses. The sanctity of contracts is the foundation of our judicial system. All these grounds reinforce each other.

The conduct of the respondent companies has been, we believe—and hope—unprecedented among public utilities. So far from endeavoring to carry out the public purposes for which they were created and on account of which they were invested with special privileges, they have deliberately entered upon, and sought by devious means to carry out, a scheme to rid themselves of the more troublesome and less profitable phase of their public duties. After first stripping the so-called Street Railway Company of practically all its assets and leaving it with its liabilities, they thereafter, while seeking relief from public authorities on account of alleged competition from jtneys and buses, were cooperating in the establishment of such bus company and actually making cash contributions to its operating expenses—and then abandoned the electric railway service altogether on the plea of lack of funds and excessive competition. Such conduct should not be tolerated by this Court.

The Supreme Court of South Carolina and also the Railroad Commission have found that the City of Columbia and the surrounding communities are very much in need of an electric street railway service, and that such service honestly operated could be made to yield a fair return. City Council has also determined that the service is necessary for the City. Electric railway transportation is inherently cheaper, more dependable, and more desirable than any other form of public transportation. Electric street railway cars generally operate with the regularity of the rivers by which their motive power is generated, and their routes have the permanency of the streets upon which their tracks are laid, whereas bus and like forms of transportation are subject to a multitude of variable operating contingencies.

Columbia is the only city of its size without electric railway transportation in any of the surrounding states, and probably throughout the Union. The lack of such transportation system is a permanent handicap and injury to the City, which is having and will continue to have a serious effect on the city's growth. The owners of this public utility

should not, we submit, be allowed thus to use public privileges for their private benefit and to the prejudice of the public.

For all these reasons, we respectfully submit, the judgment of the South Carolina Supreme Court should be affirmed, and the company should be required to restore the electric railway service.

Respectfully submitted,

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APPENDIX

The Companies' Charter Franchise and Other Contracts

(Granted by Act of December 16, 1891 and Columbia Ordinance of October 11, 1892, to Columbia Electric Street Railway, Light and Power Company (now Columbia Railway, Gas & Electric Company, merged with Broad River Power Company), incorporating appropriate sections of former Acts and Ordinances, with Amendments, with Excerpts from other Contracts.)

"AN ACT to Authorize the Consolidation of the 'Columbia Electric Street and Suburban Railway and Electric Power Company' and the 'Congaree Gas and Electric Company,' under the name of 'The Columbia Electric Street Railway, Light and Power Company,' and to confer upon the consolidated company all of the franchises and powers conferred by charter upon the consolidating companies, and also those conferred by charter upon 'The Columbia Street Railway Company' which said consolidated company is to purchase.

Whereas, the 'Columbia Electric Street and Suburban Railway and Electric Power Company' and the 'Congaree Gas and Electric Company' have agreed to consolidate the property, franchises and privileges owned and held by them, the consolidated company to be known as 'The Columbia Electric Street Railway, Light and Power Company,' which consolidated company is to acquire the property, franchises and privileges of 'The Columbia Street Railway Company.' Now therefore,

Section 1. Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That the 'Columbia Electric Street and Suburban Railway and Electric Power Company' and the 'Congaree Gas and Electric Company' be, and they hereby are, authorized to con-

solidate their property, franchises and privileges into one company, under the name of 'The Columbia Electric Street Railway, Light and Power Company,' such consolidation to be effected by a deed of indenture, to be executed by the two consolidating companies, declaring their intention so to consolidate, and transferring to said consolidated company all of the property, franchises, rights and privileges owned or held by each of them respectively.

Section 2. That upon such consolidation 'The Columbia Electric Street Railway, Light and Power Company' shall be vested with all the rights, franchises, powers and privileges conferred upon the consolidating companies by an Act entitled 'An Act to incorporate the Congaree Gas and Electric Company,' approved December 24, A. D. 1887 (*i. e.*

"'The said corporation shall have full power and authority to manufacture, make and sell gas, to be made of rosin, coal, oil, turpentine, or other material, and to furnish such quantities of gas as may be required in or near the City of Columbia, for lighting the streets, stores, manufactories and buildings there situate, and for heating and other purposes; to lay pipes or other conductors for conducting gas through the streets, alleys, lanes and squares of the City of Columbia aforesaid, or its vicinity; and the said corporation shall have full power and authority to carry on and conduct the business of using electricity for any purpose, and of manufacturing light, heat and power, or either or all of them, by electricity or any other agent or agents whatsoever, within the said State and to the inhabitants thereof, for lighting and heating the streets, roads, lanes, alleys, avenues and public grounds of the several cities, towns and villages thereof, and for lighting the stores, manufactories, residences and all other buildings therein, and steamboats, railroad cars, locomotives, or for other transportation or industrial purposes, and for such purposes to erect or lay all necessary poles, pipes and conductors, subject to proper municipal ordinance and restriction, and the supplying of power to carry on and conduct the business of dealing in dynamo-

electric machines, voltaic arcs, and incandescent lamps, regulators, meters, and other apparatus, devices and appliances which may be used or applied in producing light or power by electricity or in connection therewith; and the said corporation shall have full power and authority to erect shops, works and such other buildings as may be necessary or desirable, and to purchase, take, hold, sell and convey in fee simple, or for less estate, any lands, tenements, or hereditaments, goods, chattels, rights and credits, which may be connected with or in any manner conducive to the purposes for which said company is established; to issue bonds or bonds of the company, secured by mortgage or otherwise, in such amount or manner as the said corporation may determine." (Sec. 2).)

and by an Act entitled 'An Act to incorporate the Columbia Electric Street and Suburban Railway and Electric Power Company,' approved December 24, A. D. 1890, or any Acts amendatory thereof (*i. e.*

"That the said company shall have the power to purchase, hold and sell real and personal property for the purposes of its business." (Sec. 3.)

"That the said company shall have power to construct or acquire single or double railway tracks, of such gauge as they may elect, through any street or streets of the City of Columbia, with consent of City Council, and to extend the same five miles into the country, in any direction or directions they may wish, from the State Capital. And the said company is authorized and empowered to contract for and provide electric power for any other purpose or purposes." (Sec. 5.)

"That said company shall have power to operate their cars in the transportation of passengers and freight over the tracks they may construct or acquire, in said city, with electric power, in suitable carriages, and at such rates as may be fixed upon in the by-laws of the same." (Sec. 6.)

". . . provided, That said company begins to operate its railway in said city within five years." (Sec. 8).)

and that said consolidated company be subject to all of the debts and liabilities of the two consolidating companies; and that the said consolidated company be authorized and empowered to purchase and acquire the property, franchise, and privileges of 'The Columbia Street Railway Company,' and upon such purchase said consolidated company be vested with all the rights, powers, franchises, and privileges conferred by an Act entitled 'An Act to incorporate the Columbia Street Railway Company,' approved February 9th, A. D. 1882 (*i. e.*

> "That the said Company shall have power to construct single or double railway tracks of such gauge as they may elect, through any street or streets of the City of Columbia, as it may deem advisable for the accommodation of the public or the interest of the Company, and to extend the same five miles beyond the corporate limits of said City: *Provided*, That the said Company shall so construct said railways that they shall not obstruct the streets through which they pass, and that the Company shall be required, after laying said railways, to replace the portion of the streets over which they pass, in good condition, and thereafter keep their railway in like good order; in consideration of which the said Company shall have such exclusive right of way over said railway as may be necessary for the proper conduct of its business." (Sec. 5.)
>
> "That said Company shall have power to transport passengers and freight in suitable and sufficient carriages and cars, at such rates as may be fixed in the by-laws of the same." (Sec. 6.))

but such purchase to be without prejudice to creditors of The Columbia Street Railway Company to enforce their rights against said Columbia Street Railway Company.

Section 3. That for the purpose of the consolidation and purchase herein authorized, said 'The Columbia Electric Street Railway, Light and Power Company' shall be authorized and empowered to issue seventy-five thousand dollars of paid up capital stock, in seven hundred and fifty shares of one hundred dollars each, to be divided in such proportions as may be agreed upon between the two consolidating companies for

distribution among their respective stockholders; and may also issue mortgage or coupon bonds, not to exceed one hundred and fifty thousand dollars (folio 959), bearing interest at a rate not exceeding seven per centum per annum, to be sold and the proceeds applied as agreed upon; and may, for other purposes of the company, from time to time, issue additional mortgage or coupon bonds to bear such rate of interest as may be agreed upon; and the said company shall have the power, in order to secure any or all bonds issued by it, to secure the same by a mortgage or mortgages of its property and franchises.

Section 4. That said company may purchase and hold any real estate for the purpose of improvement that may be deemed advisable, in or near the City of Columbia, and the same may sell, lease, or mortgage.

Section 5. That upon the consummation or completion of the consolidation of the said companies as is provided for in this Act, the organization of the consolidated company shall be completed by the election of a Board of Directors from among the stockholders in said consolidated company as may be agreed upon. The Board of Directors thus elected shall continue in office for one year, and until their successors shall be duly elected, and thereafter there shall be annual meetings of the stockholders of said company, at which directors shall be chosen, whose term of office shall be as above provided.

Section 6. That the duration of the charter hereby granted shall be for the term of fifty years, and until the final adjournment of the General Assembly next thereafter.

Section 7. That this Act shall be taken and deemed as a public Act, and shall take effect immediately upon its approval."

(Act of December 16th, A. D. 1891, 1891 Statutes at Large, pp. 1453–1455.)

(Such "consent of City Council" being obtained under Ordinance of October 11, 1892, as follows):

"The Columbia Electric Street Railway, Light and Power Company, having purchased the line of street railway of the Columbia Street Railway Company, with its franchises, rights, and privileges, the powers and privi-

leges heretofore granted to the Columbia Street Railway Company are hereby conferred upon the former company, and the said company shall be subject to all the duties, liabilities, restrictions and regulations now or hereafter prescribed for said Columbia Street Railway Company." (Oct. 11, 1892, O. Sec. 360, Sec. 561.)

"The Columbia Electric Street Railway, Light and Power Company shall have the privilege of using electricity as a motive power for its cars, and the further privilege of laying two tracks from the Union Depot on Gervais Street to Richardson Street, and along Richardson Street to Laurel Street, said tracks not to be more than six feet apart; and one track from the Union Depot on Gervais Street to the river. On streets where single tracks run, turnouts will be allowed where necessary; said company (folio 984) may relay the track of the railway line purchased by them along the entire line, and to erect poles between the said tracks on the centre line of the streets, except where such lines are to run on streets with shade trees, where the lines, tracks and poles shall run between the sidewalk on one side and the centre line of the street, and as near the centre of the street as practicable, and to hang all necessary wires thereon, and to erect poles and hang feed wires thereon from its power station along such streets as it may be desired to reach; and to have the further privilege of running its cars at the rate of speed not exceeding ten miles per hour on Main Street and not exceeding twenty miles per hour on all side streets; and in all other respects said company is to have the right and the privileges conferred upon the Columbia Street Railway Company, and be subject to the restrictions and conditions hereinbefore prescribed for said company." (Sec. 561–Sec. 562.) (*i. e.*

"The Columbia Street Railway Company is authorized to lay its tracks as follows, that is to say: (naming the streets upon which tracks are to be laid) (O. Sec. 348, Sec. 549).

"The said tracks, turnouts, etc., shall be laid along such portions of the said streets as may be determined by the City Surveyor and the Committee on Streets, complying with the surveyor's regulations and gradients that are or may be hereafter adopted by the city, so as will least interfere with the repair and laying of the water, gas and sewer mains, and the preservation of the trees, and at the same time will furnish no greater obstruction than is necessary to the free use and enjoyment of the (folio 979) streets. The gauge of the said tracks shall be 4 feet 8½ inches and the rails for said track shall be of improved street railway iron, and shall be so laid that the top of the rail shall be even with the grade of the street. The said corporation shall keep in repair all bridges, turnouts, drains, etc., which the track or tracks cross; and when a bridge is necessary for the crossing of any drain, said drain shall be bridged the width of the street, exclusive of the pavement, wherever required by the city authorities, at the same level at which the track or tracks cross, and shall plank, pave, macadamize or gravel the said tracks between the rails and for as many feet, not less than three, on each side of the track as may be and at such times as required by the city authorities . . ." (O. Sec. 349–Sec. 550.)

"**It shall be the duty of the company on week days to run a car for passengers at least every hour from 7 A. M. to 9 P. M.,** except on that portion of the road which shall be laid for pleasure trips only, the running of which shall be directed by the company until directed by Council to change the same, but this Section shall not be construed to prevent trips during the whole night, should the company so desire." (Ib., Sec. 352–Sec. 553.)

"If the said company shall neglect or refuse to run their passenger cars as herein provided for a period of three months, then the corporate authorities of this city may rent the road at public outcry for account of the company for a period of twelve months; and if the road be not rented, and shall be idle for a period of twelve

months, then the said city authorities may have the said road taken up, and the material sold to the highest bidder, and after deducting the expenses of taking up the road, selling the said material, and repairing the streets, the balance, if any, shall be paid to the legal representative of the said company. All the tracks above provided for in and along the streets above mentioned shall be constructed within twelve months from June 29, 1886; failure so to construct said tracks shall deprive the Street Railway Company of all the privileges granted herein." (Ib., Sec. 354, Sec. 555.)

"The corporate authorities reserve the right to amend or alter this Chapter whenever circumstances may require it, and the granting of the privilege to this company to construct its track through any street is not exclusive, and the city authorities may grant the same right to other companies through the same streets or thoroughfares, if they deem it advisable." (O. Sec. 359–Sec. 560.)

"The City Council of Columbia shall have power, and hereby reserves the right, to regulate by ordinance the manner of operating said electric railway, and to alter and amend the Ordinances of this city relating thereto, by such further enactments as, in their judgment, the public welfare may demand." (O. Sec. 362–Sec. 565.)

(The system having been "extended" "into the country," as provided by the Act under the following, among other, contracts.)

(Excerpt from lease, dated 6 September, 1902, between Columbia Land & Investment Company, "party of the first part" and Columbia Electric Street Railway, Light & Power Company, "party of the second part"):

"To have and to hold the said line of railway with its rights and appurtenances to the party of the second part, its successors and assigns for the full period of ninety-nine years, commencing on the fifteenth day of August, 1902, and ending the 15th day of August, 2001; the party

of the second part, yielding and paying therefor a rental of Four Hundred and Forty-four and Fifty-six One Hundredths ($444.56) Dollars per annum, payable in two equal semi-annual installments of Two Hundred and Twenty-two and 28/100 ($222.28) Dollars, on the fifteenth day of February and August of each and every year during the continuance of the time of this lease.

"The party of the second part hereby covenants and agrees that it will, at all times during the continuance of this lease, and to the end thereof, maintain the line of said railway in good order, making all necessary repairs and renewals thereof for that purpose, paying all taxes and charges thereon, and that it will, during said period, continuously operate said line of railway by running at least one car per hour each way over the same between the hours of 7:30 A. M. and 8 P. M. daily; and that it will, at all times indemnify and save harmless the party of the first part from liability for damage caused by accident or otherwise by operating said lines or railway as above stipulated for."

(Excerpt from North Columbia Land Company contract, dated 24 August, 1906.)

"That the said St. Ry. Co. after the present line of the said Improvement Company shall have been conveyed to it as hereinafter provided will thenceforth maintain and keep the same in good condition and repair, and will likewise after the proposed extension is completed as herein provided thenceforth maintain and keep it in good condition and repair, and run and operate street railway cars over the said line and extension in connection with its lines of street railway in and near the said City of Columbia on convenient and reasonable schedules of not less than one car for every hour from 8 o'clock in the morning to 8 o'clock at night, and as much later and oftener as travel will warrant, of each day, at one fare of not more than 5c for each passenger from and to any of the usual stopping places on any of its lines,

including the line of the said Improvement Company and the proposed extension. . . ."

(Excerpt from Shandon Annex Company contract, dated 30 May, 1910.)

"The railway company agrees to operate said railway as follows: it will furnish power and operatives therefor, **and will maintain not less than one standard car on a regular schedule** between the terminus of the said line and the corner of Main and Gervais Streets, **the schedule of said car to be maintained** as far as possible with a view to giving the most convenient schedule of Shandon Annex, **and not less than one car an hour.** The car on the said line shall start as early and run as late at night as the travel over the said line shall justify. The railway company agrees to charge one five cent fare and to furnish transfers in the same manner and under the same rules as upon other lines of the railway company, subject to all reasonable rules and regulations which may be necessary to prevent the abuse of transfers.

"In consideration of the payment to the railway company in cash by the Annex Company of the sum of Twenty-five Hundred Dollars ($2,500.00), and, when the said railway shall be completed, delivering to the said railway an absolute and unqualified transfer and conveyance of said railway and appurtenances thereto, including the right of way in perpetuity not less than thirty feet wide, with the privilege of double tracking same should it become necessary or expedient, the railway company agrees to put in operation the schedule above described and to maintain the same."

(Excerpt from Act of 1920, Paragraph 22, 31 Stat., 741-742.)

"(5059) Sec. 22. Condition of Cars—Number—Duties of Railway Commission—Tracks and Structures.—No electric car shall be operated for the purpose of carrying passengers which has a flat wheel, broken window or window panes, broken door or door panes, or having leaky roof, side or other part thereof. All corporations oper-

ating electric railways shall have and keep in constant operation a sufficient number of cars, convenient and comfortable and clean cars to trasport the usual number of persons desiring transportation; and shall, in addition thereto, keep in reserve a sufficient number of cars, power, equipment, ways, means and facilities to supply transportation in case of emergency, and when demand for transportation shall temporarily increase it shall be the duty of the Railroad Commission to prescribe the number and condition of cars, power, equipment, ways, means and facilities that may be reasonably necessary under the circumstances. And said Commission shall have power to enforce its orders as may now or hereafter be provided by law in other cases. It shall be the duty of all persons, firms or corporations owning or operating electric railways to keep and maintain all of its tracks, roadbed, and all structures along its line in a secure, safe and substantial condition, capable of bearing such burden as it may reasonably be subject to." (S. C. Code 1922, p. 1532.)

(Columbia Ordinance of August 23, 1921.)

"Granting the Right to Columbia Railway, Gas & Electric Co. to Lay Tracks on Certain Streets.

Section 1. Be it ordained by the Mayor and Councilmen of the City of Columbia in Council Assembled, That the Columbia Railway, Gas & Electric Company is hereby empowered and authorized to build, construct and maintain a single track for its electric street railway, together with the poles, wires and necessary appurtenances, from existing track on Harden Street out Hampton Street to Heidt Street and thence on Heidt Street to the southern line of Taylor Street: *Provided*, That such track be laid out and constructed under the supervision of the City Engineer; and *Provided, further*, That the above privileges are upon the express condition that the said Company comply with all the rules, regulations and ordinances of the City of Columbia now of force or hereafter to be enacted, relating to the construction

of street railways and the operation of the same: *Provided, also,* That the above privileges shall be subject to the provision of Section 594 of the Revised Ordinances of the City of Columbia, as codified in 1920. *Provided,* That all expense including all necessary filling and grading be borne by Columbia Railway, Gas & Electric Company.

"Done and ratified under the corporate seal of the City of Columbia this 23rd day of August, A. D. 1921."

(Ordinance of January 24, 1928.)

"*Whereas,* it is provided in and by the statuter and the ordinances constituting the charter agreements under which the Broad River Power Company and the Columbia Railway, Gas & Electric Company have acquired and exercised the franchises and privileges to supply to the City of Columbia and community the public utilities of gas, electric light, power and street railway service that said privileges were granted 'upon the express condition that the said company comply with all the rules, regulations and ordinances of the City of Columbia now of force or hereafter to be enacted, relating to the construction of street railways and the operation of the same' (See Ord. Nov. 24, 1896, Sec. 563; Revised Ord. 1920, Sec. 507), and that city council should have the right to amend the street car ordinances 'whenever circumstances may require it' (See Sec. 560 Ord. June 29, 1886; Sec. 594 Ord. 1920), and further that the council should have the right and power 'to regulate by ordinance the manner of operating said electric railway and to alter and amend the ordinances of the city by such further enactments as in their judgment the public welfare may demand' (See Ordinance Oct. 11, 1892, Sec. 565; Revised Ord. 1920, Sec. 599), and

"*Whereas,* the ordinance heretofore enacted on 29 June, 1886, providing for the daily operation of the street car service and fixing a schedule of at least one car per hour from 7 A. M. to 9 P. M. prescribed for the operation of street cars, is insufficient to meet the needs of the traffic

at this time when the population of the City of Columbia and community have more than trebeled since 1886, and presented circumstances require an amendment of said ordinance, and in the judgment of Council the public welfare demands a more frequent schedule.

Now, therefore, be it ordained by the mayor and councilmen of the City of Columbia, acting in pursuance of the powers and authority hereinabove referred to, that the following section of the ordinance relating to street railways enacted on 29 June, 1886, as Sec. 352 (Ord. 1907, p. 145) and reenacted into the ordinance of 1920 (Ord. 1920, p. 191), as Sec. 583:

'Sec. 553: When cars to Run.—It shall be the duty of the Company on week days to run a car for passengers at least every hour from 7 A. M. to 9 P. M. except on that portion of the road which shall be laid for pleasure trips only, the running of which shall be directed by the Company until directed by Council to change the same, but this Section shall not be construed to prevent trips during the whole night should the Company so desire,' be amended and modified so as to read as follows:

When Cars to Run: It shall be the duty of the said Companies to run their cars on all their several lines leading into and from the City of Columbia, as well as all lines within the City, for passengers, so as to provide a service for all points served by said lines of at least one car every thirty minutes from 6 A. M. to 11 P. M. daily.

Provided: This Ordinance is not intended in any way to modify, affect, or release, any contract requiring the Companies to maintain a more frequent schedule.

The said Companies are hereby required and directed forthwith to institute and maintain the said schedule, and to keep the same in constant operation subject to the further orders of Council."